

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 303

ALASKA INDUSTRIAL BOARD AND
CARL E. JENKINS,

Petitioners,

vs.

CHUGACH ELECTRIC ASSOCIATION, INC., A COR-
PORATION, AND GENERAL ACCIDENT, FIRE
AND LIFE ASSURANCE CORPORATION, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 22, 1957

CERTIORARI GRANTED OCTOBER 14, 1957

No. 14616

**United States
Court of Appeals**
for the Ninth Circuit

**ALASKA INDUSTRIAL BOARD, Composed of
HENRY A. BENSON, Territorial Commis-
sioner of Labor; NEIL F. MOORE, Territorial
Insurance Commissioner; and J. GERALD
WILLIAMS, Attorney General of Alaska; and
CARL E. JENKINS,**

Appellants,

vs.

**CHUGACH ELECTRIC ASSOCIATION, INC., a
Corporation, and GENERAL ACCIDENT
FIRE & LIFE ASSURANCE CORPORA-
TION, LTD., a Corporation,**

Appellees.

Transcript of Record

**Appeal from the District Court
for the District of Alaska,
First Division**

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[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

J. GERALD WILLIAMS,

P. O. Box 366,

Juneau, Alaska,

For the Appellants.

R. E. ROBERTSON, ESQ.,

200 Seward Bldg.,

Juneau, Alaska,

For the Appellees.

Form AIB No. 104AB

First Report

Physician's Report of Injury
to the Territory of Alaska
Alaska Industrial Board
Box 2141, Juneau

This report to be filed forthwith after first attendance.

The Patient

1. Name of Injured Person: Carl Jenkins.
- 1a. Occupation when injured: Electrician. Age: 42.
Married or Single: M. Sex: M.
2. Address: 611 East 4th. City or Town: Anchorage.
3. Name of Employer: Chugach Electric Assn.
Business: Elec. Distribution.
4. Address of Employer: 4th & East E. City or Town: Anchorage.
5. Insured by (Name of Company): General Accident, Bud Nock, Box 1313, Anchorage.

The Accident

6. Date of Accident: 9-21-50. Hour: 1:30 p.m.
Date disability began: 9-21-50.
1. State in patient's own words where and how accident occurred: Working on 12,000 volt stuff—came to on the ground.

The Injury

8. Give accurate description of nature and extent of injury and state your objective findings:
1. 3rd degree burns of left arm at the elbow down to the bone, no pulse, no sensation of the lower arm. (Continued on attached sheet.)
9. Will the injury result in (a) Permanent defect? Yes. If so, what? See attached sheet. (b) Facial or head disfigurement? No.
10. Is accident above referred to the only cause of patient's condition? Yes. If not, state contributing causes
11. Is patient suffering from any disease of the heart, lungs, brain, kidneys, blood, vascular system or any other disabling condition not due to this accident? Yes. Give particulars: Temporary cardiac irregularity after accident. Did accident aggravate this condition?.....
12. Has patient any physical impairment due to previous accident or disease, No. Give particulars:
13. Has normal recovery been delayed for any reason? No. Give particulars:.....

Treatment

14. Date of your first treatment: 9-21-50. Who engaged your services? Employer.
15. Describe treatment given by you: See attached sheet.

16. Were X-rays taken? No.
17. X-ray diagnosis.....
18. Was patient treated by any one else? No.
19. Was patient hospitalized? Yes. Name and address of hospital: Providence, Anchorage, Aaa
20. Date of admission to hospital: 9-21-50. Date of discharge:
21. Is further treatment needed? Yes. For how long? Indefinite.

Disability

22. Patient was/will be able to resume regular work on: Indefinite.
23. Patient was/will be able to resume light work on: Indefinite.
24. If death ensued, give date:

Give any information of value not included above on back of this sheet.

I am a duly licensed physician in the State of California—Alaska.

Physician's Name: H. G. Romig, M.D.

/s/ H. G. ROMIG,

Address Box 373, Anchorage,
Alaska.

Date of this report 9-22-50.

[Stamped]: Received Oct. 4, 1950.

[Attached to Report]

8. (2) Deep 2nd. & 3rd. degree burns of left upper arm, elbow to axilla. (3) 2nd. degree burn of right forearm. (4) 3rd. degree burns of both feet with varying degree up ankles.
9. Loss of toes, and feet in part. Loss of left lower arm.
15. Sterile debridement and dressing. Antibiotics topically and systemically. Plasma, glucose, morphine.

Received October 4, 1950.

Form AIB No. 104AB

Physician's Report of Injury
to the Territory of Alaska
Alaska Industrial Board
Box 2141, Juneau

This report to be filed forthwith after first attendance.

This form may also be used for submitting supplemental information.

The Patient

1. Name of Injured Person: Carl Jenkins.
- 1a. Occupation when injured: Electric Lineman.
Age: 44. Married or Single: M. Sex: M.

2. Address: 611 E. 4th Ave. City or Town: Anchorage.
3. Name of Employer: Chugach Electric Ass'n.
Ins. Business:
4. Address of Employer: City or Town: Anchorage.
5. Insured by (Name of Company):

The Accident

6. Date of Accident: 9-22. Hour: 1:15 p.m. Date disability began: 9-22, 1:15 p.m.
7. State in patient's own words where and how accident occurred: Patient caught in a 12,000 volt arc which entered his body thru left elbow and exploded thru both feet.

The Injury

8. Give accurate description of nature and extent of injury and state your objective findings. Extensive elec. burns left arm and hand and both feet.
9. Will the injury result in (a) Permanent defect? Yes. If so, what? Amputations—3 extremities. (b) Facial or head disfigurement?
10. Is accident above referred to the only cause of patient's condition? Yes. If not, state contributing causes.
11. Is patient suffering from any disease of the heart, lungs, brain, kidneys, blood, vascular

system or any other disabling condition not due to this accident?..... Give particulars.....
Did accident aggravate this condition?.....

12. Has patient any physical impairment due to previous accident or disease..... Give particulars
13. Has normal recovery been delayed for any reason?..... Give particulars.....

Treatment

14. Date of your first treatment: 9-29-50. Who engaged your services? Patient.
15. Describe treatment given by you: amp. left arm above elbow; rt. leg mid-calf; left foot all toes except 5th.
16. Were X-rays taken?..... By whom?.....
When?
17. X-ray diagnosis.....
18. Was patient treated by any one else? Yes. By whom? Howard Romig. When? 9.... to 9-29.
19. Was patient hospitalized? Yes. Name and address of hospital: Virginia Mason Hosp.
20. Date of admission to hospital: 9-29-50. Date of discharge:
21. Is further treatment needed? Yes. For how long? Indefinite.

Disability

22. Patient was/will be able to resume regular work on:
23. Patient was/will be able to resume light work on:
24. If death ensued, give date:

Give any information of value not included above on back of this sheet.

I am a duly licensed physician in the State of....

Physician's Name: Louis H. Edmunds.

/s/ LOUIS H. EDMUNDS,

Address 1115 Terry Ave.

Date of this report 10/24/50.

Received November 1, 1950.

AIB-4b

Territory of Alaska
Alaska Industrial Board

Physician's Supplementary Report.

1. Name of injured person: Mr. Carl Jenkins.
Address: Anchorage, Aaa.
2. Name of employer: Chugach Electric Assn. Address: Anchorage, Aaa.
3. I first attended him on: Case re-opened 3-31-51.
4. I have since attended him on the following dates, viz., April 6, 16, 20, 27, 1951; May 4, 11, 18, 24, 31, 1951; June 7, 14, 21, 28, 1951.

5. Give an accurate and complete description of the nature and extent of the injury which resulted from the accident or occupational exposure and present condition (state your objective findings):

At the present time left foot is improving, but whether it can be permanently preserved without amputation is still a moot question otherwise his progress is slow but satisfactory.

6. Is the claimant's present condition the result of the injury above described? Yes.

Sec. 1-12 (In those cases where an employee receives an injury arising out of and in the course of his or her employment which, of itself, would cause only permanent partial disability but which, combined with a previous disability or injury, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury, provided, however, that in addition to compensation for such permanent partial disability and after the cessation of the payments for the amounts prescribed therefor, the injured employee shall be paid the remainder of the compensation that would be due for permanent total disability, out of the second injury fund hereinbefore created and provided.)

7. In your opinion, was the accident or occupational condition as above described a competent producing cause for the injury sustained? Yes.

8. Is he able to resume his usual work? No. If so, when first able?.....
9. Is he able to resume any work?..... If so, when first able and Nature of work?.....
10. Dated at Anchorage, Alaska, this day of 29th June, 1951.

J. H. STEWART, M.D.,

/s/ J. H. STEWART,

Address, Box 373 Anchorage,
Aaa.

[Stamped]: Received July 10, 1951.

Anchorage Medical & Surgical Clinic
Fourth Ave. and L Street, Post Office Box 373
Anchorage, Alaska

August 17, 1951.

Mr. Henry Benson,
Commission of Labor,
Juneau, Alaska.

Re: Carl Jenkins.

Dear Mr. Benson:

There is no doubt but what Mr. Jenkins will be a long time disabled, and under care. Whatever is right should be done for him.

Sincerely,

/s/ H. G. ROMIG,

H. G. ROMIG, M.D.

Received August 27, 1951.

Anchorage Medical and Surgical Clinic
4th Ave and L Street
Box 373
Anchorage, Alaska

Asa L. Martin, M.D.

Howard G. Romig, M.D.

September 21, 1951.

James E. Swan,
1 Pearl Building,
Anchorage, Alaska.

Re: Carl Jenkins.

Date of injury: 3-31-51.

Employer: Chugach Electric Association.

Dear Mr. Swan:

The Alaska Industrial Board has the complete routine file on Mr. Jenkins; also a couple of more complete letters.

To make it short the man has the left arm amputated near the shoulder. The artificial arm is purely a cosmetic device and serves no function. The same is not true for the artificial limb replacing the leg amputated below the knee. He has average function of the artificial leg.

The right leg is largely useless due to a slowly healing foot wound. Furthermore the foot and ankle on this side are almost without sensation even though healed over by scar.

The man is totally disabled. The foot will heal in a matter of months—how many I cannot say.

When healed he will be disabled to a very very high degree.

Sincerely,

/s/ HOWARD G. ROMIG,

HOWARD G. ROMIG, M. D.

GH:HGR

cc: Mr. Jenkins.

cc: Alaska Industrial Board.

[Stamped]: Received October 3, 1951.

Anchorage Medical & Surgical Clinic

4th Ave. and L St., Box 373

Anchorage, Alaska

May 2, 1952.

Alaska Industrial Board,

Box 2141,

Juneau, Alaska.

Re: Carl Jenkins.

Date of injury: 9-21-50.

Employer: Chugach Electric Assoc.

Dear Sir:

This man was injured 9-21-50, while working for the Chugach Electric Association. As a result he lost his left arm below the shoulder, lost right leg below the knee. His left foot was amputated at the level of the articulation of the toes.

The right leg and left arm with artificial limbs work as well as could be expected. The left foot however has failed to heal. Any use of the foot causes breakdowns and slough of the tissues.

On the whole the circulation of the left foot is better. Yet weight bearing causes necrosis* and slough.

My plans for treatment would encompass any or possibly all the following procedures: (1) re-hospitalization (2) sympathectomy (3) re-amputation and (or) large thick graft.

I estimate that these procedures would be time consuming and very expensive; and yet they will be necessary to restore him to some percentage level of occupational ability. As it is, there is little he can do towards making a living. His case has reached a static level as an outpatient. I believe the above outlined procedures should be instituted soon.

*Definition: Necrosis, dead tissue.

Sincerely,

/s/ HOWARD G. ROMIG,

HOWARD G. ROMIG, M.D.

HGR:gh

cc: Mr. Swan.

cc: Mr. Jenkins.

[Stamped]: Received May 13, 1952.

James E. O'Malley, M. D.

Virginia L. Wright, M. D.

805 Fourth Avenue

Anchorage, Alaska

July 18, 1952.

To Whom This May Concern:

Re: Jenkins, Carl E.

The above-named individual was electrocuted on September 21, 1950, during the course of his employment with Chugach Electric Association. As a result of a high voltage current passing through his body, he sustained severe burns of the right leg, left arm and left foot. The burns were so extensive and damage to the circulation was such that gangrene developed in the left arm which necessitated the removal of the left arm approximately 6" below the shoulder joint and the right leg below the knee. The left foot and ankle were extensively burned and the circulation was also impaired. The great toe and three of the lesser toes were surgically removed because gangrene intervened. The individual only has the little toe left on this foot. The individual received a prolonged period of hospitalization during which skin grafts were applied to the instep and ankle. Shortly after he became ambulatory on an artificial limb, as well as a brace on the left foot, he developed a large trophic ulcer on the end of the affected foot immediately behind the site of the amputation of the toes. This ulcerated area has resisted all efforts to heal it. X-ray examination of his foot and ankle reveals extensive osteoprosis

of the bones of the foot and ankle. In addition, there is also a small fragment of the phalanx of the fourth toe on the left foot remaining.

We have here an individual who was electrocuted and so severely burned that it was necessary to remove his right leg, his left arm and the great toe and three others on his left foot. In addition, he also lost a considerable portion of the skin of the ankle and instep as a result of extensive burns. It was necessary for him to be hospitalized over a long period of time and numerous skin grafts were applied to the injured foot. As soon as the individual became ambulatory, he developed a trophic ulcer at the end of the affected foot. This ulcer has not healed despite continuous application of treatment. It is my feeling that this individual, for all intents and purposes, has lost the use of his left foot and ankle as a result of the burns he received at the time he was injured. I further feel that this individual is facing another amputation of the left foot as I do not think the ulcer will respond to treatment and further that he is likely to develop osteomyelitis and a cellulitis, secondary to this ulcer, with the passage of time.

Very truly yours,

/s/ JAMES E. O'MALLEY,

JAMES E. O'MALLEY, M.D.

JEOM/mh

Received August 13, 1952.

Territory of Alaska
Alaska Industrial Board

CARL E. JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC ASSOCIATION, INC.,
and GENERAL ACCIDENT FIRE & LIFE
ASSURANCE CORPORATION, LTD.,

Defendants.

AFFIDAVIT OF LOUIS H. EDMUNDS

State of Washington,

County of King—ss.

Louis H. Edmunds, being first duly sworn on oath
deposes and says:

That I am a duly licensed physician and surgeon
and for 20 years last past have specialized in or-
thopedics. Carl E. Jenkins came under my care on
September 29, 1950. He was injured September 21,
1950. From the instant of his accidental injury there
was a complete loss of use of his lower right leg
and his left arm. The only possible repair was surgi-
cal amputation of these extremities which was done
by me as soon as possible.

/s/ LOUIS H. EDMUNDS.

Subscribed and Sworn to before me this 24th
day of January, 1952.

[Seal] /s/ MILDRED M. PALITZKE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received January 22, 1953.

Doctor's Clinic
Box 1700
Anchorage, Alaska

January 8, 1953.

Plummer & Areell,
Attorneys,
Anchorage, Alaska.

Re: Carl Jenkins.

Gentlemen:

Carl Jenkins is a 46 year old ex-lineman for Chugach Electric Company, who on Sept. 21, 1950, was handling a live wire with his right gloved hand when the current arced through the glove throwing his left arm around a 12,000 volt line. The current then went out through both feet. He was stunned until getting to hospital after which time he was receiving narcotics. September 30th the left arm was amputated 4" below the shoulder and 10-14 days later all toes except the 5th on the left were amputated, and in another 10-14 days the right leg was removed at the mid-thigh level.

His left foot has never healed solidly where the toes were removed and breaks down into an open sore frequently. Arm and leg amputation stumps healed nicely. His nerves have bothered him recently. He shakes all over at times. He has phantom sensations in arm and leg at times.

Past history—no previous accidents, operations, nor illnesses.

Family history—negative.

Systemic review—

EENT normal. Heart normal. Lungs normal.

GI—normal except that he vomits breakfast occasionally ever since having jaundice from blood transfusion.

GU—normal.

Orthopedic—normal except for present illness.

Occupational history: Patient works selling electrical tools from his own home netting usually from \$20 to \$100 monthly.

Complete examination: Patient is a well-developed and well-nourished man of approximately stated age, who has frequent spells of involuntary marked tremor involving entire body. He wears prosthesis of his left arm and his right leg. Leg brace also worn on left leg with an ankle lock to prevent foot drop.

Eyes, ears, nose and throat normal to examination today except for nasal septum deviated to right. Neck normal. Heart and lungs normal. B. P. 130/86. Examination of abdomen is negative. Genitalia—normal male. No hernia. Left arm has been amputated 7" below the shoulder, the scar is well-healed, altho there is a slight bow-string contracture along the axillary line which does not limit motion of the stump to a significant degree. Right leg has been amputated 6" below the knee. Stump is well-healed, tissue soft and skin not adherent to bone ends.

Motion of hip joints is normal as is motion in the knees.

There are numerous scars around the left ankle—two scars along the Achilles tendon, both of which are adherent to underlying tendon, a 3" scar on the lateral surface of the ankle, and a 5 x 2½" well-taken skin graft on the dorsum of ankle and foot. There is also a "L" shaped scar on the medial surface of the ankle—the horizontal arm measuring 1½", the vertical arm 2". The entire foot is badly scarred. All the toes, except the 5th have been amputated. The skin of the dorsum of the foot is adherent to the underlying bone and tendons and can be moved very little. There is an area of questionable viability measuring approximately 1" in diameter over the distal end of the 3rd metatarsal bone of the dorsum of the foot and also a small superficial ulceration measuring approximately .8 cm in diameter along the medial and dorsal aspect of the foot. There is a deep ulcer on the plantar surface of the foot right at the distal end measuring approximately 2½" x 1½", the base of which is formed of soft tissue. No bone can be palpated. Dorsiflexion of the foot is not possible. Plantar flexion is possible but is weak.

Diagnosis: Severe electrical burn with resulting amputation of left arm below the shoulder and right leg below the knee and with multiple severe injuries to the left foot and ankle.

Estimated disability: In my opinion, this man has a permanent total disability.

Yours very sincerely,

/s/ G. HALE,

GEORGE HALE, M.D.

gh:bd

[Stamped]: Received January 22, 1953.

5/14/53

Anchorage, Alaska.

Mr. Henry Benson,
Juneau, Alaska.

Dear Mr. Benson:

In February of this year, I believe it was on the 2nd. the Territorial Labor Board ruled on my case: Carl E. Jenkins vs. Chugach Electric Association and General Accident Fire and Life Assurance Corp. I was represented by Atty. John D. Shaw of Anchorage. However I was not notified of the decision until March 2nd. when Mr. Shaw called me and informed me that the board had ruled against me and that he had requested Atty. James Swan to appeal my case as he could no longer represent me due to his personal legal difficulties.

I have never been able to obtain a copy of the ruling and would appreciate it if you could mail me a copy.

As my physical status has not changed since the first hearing when you ruled in my favor, I am still minus my left arm, my right leg and my left foot

has failed to heal and I am still under the care of Dr. Howard Romig, and am not able to earn a living. I am curious as to why the decision went against me.

Also would appreciate it if you could inform me when my appeal filed by Atty. Swan will be heard; it is sometimes hard to contact Mr. Swan and I would not want to be without representation when my case comes up.

Thanking you for past consideration I remain,

Very truly yours,

/s/ CARL E. JENKINS.

Davis, Renfrew & Hughes
Counselors and Attorneys at Law
Anchorage
Territory of Alaska
P. O. Box 477

November 10, 1953.

Territory of Alaska,
Alaska Industrial Board,
Workmen's Compensation,
P. O. Box 2141,
Juneau, Alaska.

Attention: Mr. Henry Benson.

Gentlemen:

I am writing at the request of Mr. Carl E. Jenkins, Box 1073, Anchorage, Alaska, pursuant to the

discussion Mr. Jenkins had with you on the telephone on Monday morning, November 9th, this is to request a re-opening of this matter on behalf of Mr. Jenkins.

Mr. Jenkins advises that his doctor has now taken an X-ray of his left foot and finds that a portion of the bone has deteriorated and is going to require further operations and other medical expenses.

It must be obvious here that the monies paid and offered for temporary total disability and for permanent total disability are completely inadequate to take care of Mr. Jenkins in this situation, and it seems to me that the matter might very well be re-opened in order that Mr. Jenkins might be properly compensated. Among other things Mr. Jenkins says that he had been advised by Mr. Swan, his previous attorney in connection with this matter, that an appeal had been taken from the decision of the Board, but so far as we can find no such appeal was taken. Accordingly Mr. Jenkins is apparently without recourse in this matter unless the Board takes some action to help him.

Very truly yours,

DAVIS, RENFREW &
HUGHES,

By /s/ EDWARD V. DAVIS.

EVD:s

Alaska Industrial Board

Juneau, Alaska

Docket No. 252

Case No. 0-9-370

CARL E. JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC ASSOCIATION and
GENERAL ACCIDENT FIRE & LIFE AS-
SURANCE CORP, LTD.,

Defendants.

AFFIDAVIT IN SUPPORT OF REQUEST FOR
ADJUSTMENT OF CLAIMUnited States of America,
Territory of Alaska,
Third Judicial Division—ss.

Carl E. Jenkins, being first duly sworn, upon his oath deposes and says:

That he is the above-named applicant. That he is a married man and has one child who was dependent at the time of his injury hereinafter mentioned, and is now of the age of nineteen years. That applicant Carl E. Jenkins was employed by Chugach Electric Association on the 21st day of September, 1950, and for approximately ten months prior to that date.

That affiant on the 21st day of September, 1950, while within the scope and course of his employment was injured by an electrical burn to the ex-

tent that applicant lost his left arm and his right leg below the knee and four toes on this left foot. That as a result of his injuries applicant has been totally and permanently disabled from carrying on his occupation as an electrical lineman and has not been able to follow his trade in any manner whatsoever.

That as will appear from the records and files in this matter, decision and award was entered under date of November 12, 1952. That affiant had James Swan, attorney at law, of Anchorage, Alaska, as his attorney representing him in this matter and that such attorney informed affiant on numerous occasions that he would take the necessary steps to secure a review of the award as made by the Industrial Board with the District Court and on later occasions such attorney in several instances informed affiant that he had taken the necessary steps to secure court review of the court award and that such statements were made in the presence of disinterested witnesses. That as a matter of fact as affiant is informed and believes and so alleges the fact to be, no such action was instituted by his attorney or if an action was instituted affiant has been unable to learn where or when such action was taken. As a matter of fact affiant is totally and permanently disabled without adequate compensation as contemplated by the provisions of Law.

That affiant was advised by his doctor in the month of November of 1953, that the bone in his left leg was deteriorating to the extent that he would certainly need further medical attention and

probably would need other operations and affiant finds that such leg is giving him so much trouble that it would be impossible for him to hold down any sort of any position whether as a watchman or whatever it might be even if he were able to secure such job.

That affiant believes that in equity and good conscience and in accordance with law he is entitled to have this matter reopened on his application for adjustment of claim and to have his case reviewed in the light of medical testimony as to his present condition.

/s/ CARL E. JENKINS.

Subscribed and sworn to before me this 16th day of December, 1953.

[Seal] /s/ EDWARD V. DAVIS,
Notary Public for Alaska.

My commission expires: 11-7-1954.

Receipt of Copy acknowledged.

Anchorage Medical & Surgical Clinic
Fourth Ave. and L St., 1121 Fourth Avenue
Anchorage, Alaska

December 17, 1953.

To Whom it May Concern:

Re: Carl E. Jenkins.

By review of this man's lengthy record, you will discover that he lost an arm and a leg and part of

the other foot as a result of an "Electrical burn" on September 21, 1950.

It is a well known fact that injuries of this kind are extensive, severe and long in recovery. I have seen Mr. Jenkins regularly since the date of his injury except for the time he spent in Seattle under the care of Doctor Louis Edmunds.

As it stands today, Mr. Jenkins' remaining foot is relatively useless but is improving. This foot is unhealed and requires attention regularly.

As far as I am concerned, Mr. Jenkins is disabled and unable to be gainfully employed since date of injury, because he has been under treatment. The fact that he has been up and about and able to do a few gainful things does not alter this estimation a bit.

In my opinion he will require rehospitization for a sympathectomy, re-amputation and plastic repair to the ailing foot. This will restore him to a state of permanent partial disability. After this he should be able to make some sort of a living.

/s/ HOWARD G. ROMIG,

HOWARD G. ROMIG, M.D.

HGR/k

[Stamped]: Received December 24, 1953.

In the District Court for the District of Alaska
Division Number One, at Juneau
Civil Action File No. 6994—A.

CHUGACH ELECTRIC ASSOCIATION, INC.,
a Corporation, and **GENERAL ACCIDENT
FIRE & LIFE ASSURANCE CORPORA-
TION, LTD.,** a Corporation,
Plaintiffs,

vs.

ALASKA INDUSTRIAL BOARD, Composed of
the Territorial Commissioner of Labor, **HENRY
A. BENSON,** the Territorial Insurance Com-
missioner, **NEIL F. MOORE,** and the Attor-
ney General of Alaska, **J. GERALD WIL-
LIAMS;** and **CARL E. JENKINS,**

Defendants.

**AMENDED COMPLAINT AND APPEAL FROM
DECISION AND AWARD OF ALASKA
INDUSTRIAL BOARD UNDER THE
WORKMEN'S COMPENSATION ACT OF
ALASKA**

Plaintiffs appeal to the District Court for the
District of Alaska from that certain Decision and
Award of January 8, 1954, of the Defendant Alaska
Industrial Board, and complain and allege as fol-
lows:

I.

That Plaintiff Chugach Electric Association, Inc.,
is a corporation duly organized and existing under
the laws of the Territory of Alaska; that Plaintiff

General Accident Fire and Life Assurance Corporation, Ltd., is an insurance corporation duly authorized to transact the business of Workmen's Compensation Insurance in the Territory of Alaska;

II.

That the Defendant Alaska Industrial Board, hereinafter designated as "Board," was created and now exists by virtue of Sections 43-3-1, through 43-3-31, A.C.L.A. 1949, was amended by Chapter 60, Alaska Session Laws 1953, which became effective on June 24, 1953, which sections and chapter are known as the Workmen's Compensation Act of Alaska, under which Act said Board's membership is composed of Defendants the Territorial Commissioner of Labor, Henry A. Benson, the Territorial Insurance Commissioner, Neil F. Moore, and the Attorney General of Alaska, J. Gerald Williams;

III.

That the relationship of employer and employee existed between Plaintiff Chugach Electric Association, Inc., and Defendant Carl E. Jenkins on September 21, 1950, who on August 18, 1951, filed with said Board his Application for Adjustment of Claim, a true copy whereof is hereunto attached, marked Exhibit 1, and made a part hereof; that subsequently on or about August 28, 1951, said Board, without notifying Plaintiffs, returned said Application to said Defendant Jenkins;

IV.

That Plaintiff Chugach Electric Association, Inc., on or about September 7, 1951, filed its written

Admission of Service and Answer to Application, a true copy whereof is hereunto attached, marked Exhibit 2, and made a part hereof;

V.

That on or about December 10, 1951, said Defendant Jenkins filed with said Defendant Board his written Amended Application for Adjustment of Claim for payment of compensation under said Workmen's Compensation Act; that a true copy of said Amended Application is attached hereto, marked Exhibit 3, and made a part hereof;

VI.

That on November 12, 1952, one member of said Board, namely, said Defendant Henry A. Benson, made and entered in the proceedings upon said Application and Answer his Decision and Award, a true copy whereof is hereunto attached, marked Exhibit 4, and made a part hereof;

VII.

That on February 6, 1953, after a review and hearing by the full membership of said Board, it made its Decision and Award, a true copy whereof is hereunto attached, marked Exhibit 5, and made a part hereof;

VIII.

That thereafter, in pursuance to said Decision and Award of February 6, 1953, Plaintiffs paid said Defendant Jenkins the sum of \$8,100.00 in full payment of his total permanent disability and

\$476.70 in payment of his temporary disability compensation allowed by said Decision and Award of February 6, 1953, in addition to medical, surgical, and hospital expenses of \$15,204.78;

IX.

That on or about November 21, 1953, said Defendant Jenkins filed with said Defendant Board his written Application for Adjustment of Claim bearing said date, a true copy whereof is hereunto attached, marked Exhibit 6, and made a part hereof, which is based upon the identical injury and identical accident for which the Defendant Board's Decision and Award of February 6, 1953, awarded said Defendant Jenkins temporary disability compensation of \$476.70 and total permanent disability compensation of \$8,100.00, which temporary disability and total permanent disability compensation Plaintiffs heretofore paid;

X.

That on or about December 9, 1953, the Plaintiffs filed with Defendant Board their written Motion and Answer, a true copy whereof is hereunto attached, marked Exhibit 7, and made a part hereof; that none of the facts in said Motion and Answer have ever been controverted;

XI.

That in disregard to Plaintiffs' said Motion and Answer, the Defendant Board on December 28, 1953, held a hearing upon said Defendant Jenkins' Application of November 21, 1953, and thereafter

and on January 8, 1954, rendered its Decision, a true copy whereof is hereunto attached, marked Exhibit 8, and made a part hereof;

XII.

That said Decision and Award of Defendant Board of January 8, 1954, is erroneous in that:

(1) The Board had no jurisdiction to hold a hearing upon said Jenkins' Application of November 21, 1953, (Exhibit 6) or to hold a rehearing either upon his Application of August 14, 1951, (Exhibit 1), or upon his Amended Application (Exhibit 2), or to render its Decision of January 8, 1954, (Exhibit 8);

(2) Defendant Board's Decision and Award of February 6, 1953, (Exhibit 5) is *res judicata*, and the Board had no jurisdiction, power or authority, after its rendition thereof, to amend, alter, or change the terms and conditions, set aside or modify its Decision of February 6, 1953, which it did by its Decision and Award of January 8, 1954;

(3) The Defendant Board has no power or authority after having made its Decision and Award of February 6, 1953, that said Jenkins was entitled to temporary disability compensation of \$476.70 from the date of his injury on September 21, 1950, until October 28, 1950, and that he had suffered permanent total disability on October 28, 1950, for which, under said Act as then in force, he was entitled to be paid \$8,100.00, which temporary and permanent disability compensation Plaintiffs here-

tofore paid and from which said Decision and Award said Jenkins did not appeal to the District Court for the District of Alaska within 30 days after the rendition thereof or at all, to subsequently hold and decide on January 8, 1954, or ever, that, after having suffered said permanent total disability on October 28, 1950, he had suffered on October 29, 1950, and still continues to suffer, temporary total disability from the same injuries for which Plaintiffs paid him compensation in full in accordance with the said Board's Decision and Award of February 6, 1953;

(4) Said Jenkins' Application for Adjustment of Claim, dated November 21, 1953, (Exhibit 6), was not filed with the Defendant Board within two years from the date of his injury on September 21, 1950;

(5) Said Jenkins did not make or present any claim to the Defendant Board, within three years after the date of his injury on September 21, 1950, for modification of the compensation awarded him by the Defendant Board's Decision and Award of February 6, 1953;

(6) Said Act does not authorize or empower the Defendant Board, after having awarded total permanent disability compensation to said Jenkins, to subsequently award to him temporary disability compensation for temporary disability arising and continuing after the date October 28, 1950, on which, by its Decision and Award of February 6, 1953, the Defendant Board found and decided that he had

suffered total permanent disability for which it awarded total permanent disability compensation of \$8,100.00 which Plaintiffs paid and from which said Decision and Award said Jenkins did not appeal within 30 days, or ever, to the District Court for the District of Alaska.

(7) The findings of Defendant Board in its Decision and Award of February 6, 1953, are conclusive not only upon the Board itself but also upon this Court, and the Board had no jurisdiction, power or authority to subsequently alter, amend, set aside or modify them.

XIII.

Plaintiffs present this Appeal in good faith and not with the intent to fail or refuse to pay to said Jenkins such, if any, sums as may be legally awarded him; Plaintiffs have been advised by legal counsel that the Defendant Board's Decision of January 8, 1954, is invalid and contrary to the law.

Wherefore Plaintiffs pray that the Defendant Board's Decision of January 8, 1954, may be entirely suspended and set aside and that the Defendants may be permanently enjoined from doing any act or thing to compel Plaintiffs to pay any sum whatsoever to said Defendant Jenkins under or by force of said Decision and may be temporarily stayed from so doing pending this litigation and final decision on Plaintiffs' Amended Complaint and Appeal.

Dated at Juneau, Alaska, February 19, 1954.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Plaintiffs.

EXHIBIT No. 1

Territory of Alaska
Alaska Industrial Board

Application for Adjustment of Claim
Alaska Workmen's Compensation Act

CARL JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC COMPANY.

1. Carl Jenkins, while employed as Electrician, on September 21, 1950, at Anchorage, Alaska, by Chugach Electric Company, who is subject to the Act, sustained injury arising out of and in the course of said employment as follows: Working hot voltage—putting addition on sub station, electrified, resulting in left foot burnt, right arm and right arm amputated.

2. Injured left work on Sept. 21, 1950, and disability continued to present.

3. Last payment of compensation on June 23;

Last medical furnished by employer on: Still under physician. Notice of injury given employer on Sept. 21, 1950.

4. Medical and surgical treatment has been rendered by Dr. Romig, Anchorage, Alaska; Dr. Edmunds, Seattle, Washington.

5. Employee's wages were \$3.10 per hour, working 48 hours per day, days per week.

6. Total compensation paid to date \$3,600.00 approximate.

7. Injured was married and had two (2) dependents, as follows: wife, Doris C., son, Carl Edward.

8. (To be Used in Death Cases Only.)

9. A question has arisen with respect to the liability of the employer or insurance carrier, or the amount owed and the reason for filing this application is: award for total permanent disability adjustment of permanent payments.

Wherefore, it is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.

Dated at Anchorage, Alaska, August 14th, 1951.

/s/ CARL E. JENKINS.

/s/ JAMES E. SWAN,

Agent or Attorney for Applicant if Applicant represented.

EXHIBIT No. 2

Alaska Workmen's Compensation Act

Territory of Alaska
Alaska Industrial Board

CARL E. JENKINS,

Applicant;

vs.

CHUGACH ELECTRIC ASSOCIATION, INC.,
and GENERAL ACCIDENT FIRE & LIFE
ASSURANCE CORPORATION, LTD.,

Defendants.

ADMISSION OF SERVICE AND ANSWER TO
APPLICATION

The defendant above named for answer to the application herein respectfully shows:

1. It is admitted that applicant sustained an injury on or about the date set forth in application.
2. It is admitted that both the employer and employee were subject to the Alaska Workmen's Compensation Act at the time of the alleged injury.
3. It is admitted that the relationship of employer and employee existed at the time of injury.
4. It is admitted that at the time of the alleged injury the employee was performing service arising out of and in the course of employment.
5. It is admitted that Notice of Injury was given employer as set forth in application.

6. It is denied that the applicant was temporarily disabled for the period stated in the application.

7. It is admitted that the applicant was permanently disabled to the extent shown in application, namely left arm amputated above elbow; right leg amputated at mid-calf; and left foot lost all toes except fifth.

8. It is denied that the rate of wages as set forth in the application is correct, and that the correct rate was \$2.80 per hour.

Applicant has been paid \$8,100.00 compensation, which is the total compensation which he is entitled to receive, and defendants have also paid \$15,204.78 for medical, surgical and hospital expenses. Defendants will insist that all evidence be adduced in a legal manner and that no ex parte, hearsay or incompetent evidence of any kind be admitted at any hearing held on the claim.

**CHUGACH ELECTRIC ASSOCIATION, INC.,
and GENERAL ACCIDENT-FIRE & LIFE
ASSURANCE CORPORATION, LTD.,**

Defendants.

By /s/ **R. E. ROBERTSON,**

Attorney for Defendants.

Dated at Juneau, Alaska, September 7, 1951.

Note.—State under item 9 any other material facts which will clarify the position you take. If any statements are later found to be incorrect you may file an amended answer. Use other side if necessary.

EXHIBIT No. 3

Territory of Alaska
Alaska Industrial Board

Alaska Workmen's Compensation Act

CARL JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC COMPANY,

Defendant.

AMENDED APPLICATION FOR
ADJUSTMENT OF CLAIM

1. Carl Jenkins, while employed as electrician, at Anchorage, Alaska, by Chugach Electric Company, who is subject to the Act, sustained injury, arising out of and in the course of said employment as follows: Working hot voltage—putting addition on sub-station electrocuted, resulting in left foot burnt, right arm and right leg amputated.

2. Injured, left work on Sept. 21, 1950, and disability continued to present.

3. Last payment of compensation on June 23; last medical furnished by employer on: Still under physician. Notice of injury given employer on Sept. 21, 1950.

4. Medical and surgical treatment has been rendered by Dr. Romig, Anchorage, Dr. Edmonds, Seattle, Washington.

5. Employee's wages were \$3.10 per hour, working 48 hours per day, . . . days per week.

6. Total compensation paid to date: \$8,100.00.

7. Injured was married and had two (2) dependents, as follows: wife, Doris C.; son, Carl Edward.

8. (To be used in death cases only.)

9. A question has arisen with respect to the liability of the employer or insurance carrier, or the amount owed, and the reason for filing this application is:

Wherefore, it is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.

Dated at Anchorage, Alaska, August 14, 1951.

/s/ CARL E. JENKINS.

EXHIBIT No. 4

Alaska Industrial Board

Juneau, Alaska

Docket No. 152

Case No. 0-9-370

CARL E. JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC ASSOCIATION, and
GENERAL ACCIDENT FIRE & LIFE AS-
SURANCE CORP., LTD.,

Defendants.

DECISION AND AWARD

This matter comes on for decision pursuant to an application filed by Carl E. Jenkins. From the files and records in the case, Board Member Henry A. Benson, finds as follows:

Facts

Applicant Carl E. Jenkins, a married man with one dependent child was employed as an electrician by the Chugach Electric Association, an employer subject to the Alaska Workmen's Compensation Act and who had insured his liability with General Accident Fire & Life Assurance Corporation, named as defendants herein. While so employed on September 21, 1950, applicant suffered an accident which resulted in severe electrical burns requiring

the amputation of the left arm above the elbow, amputation of the right leg at mid calf, and amputation of all toes on the left foot except the fifth-toe.

Applicant was hospitalized at the Providence Hospital at Anchorage and on September 28 was hospitalized at the Virginia Mason under the care of Doctor Edmunds at Seattle. Following the amputations performed by Dr. Edmunds, applicant was fitted with prosthesis of right arm and right leg.

Temporary disability compensation was paid in the total sum of \$3,645.00 at the rate of \$95.34 per week for a period of approximately thirty-eight weeks. Applicant has had a continuing disability as the result of the failure of the left foot to heal and has continued under the care of Dr. Romig to the present time. Medical reports filed by physicians who have treated him show:

Doctor: J. H. Stewart—June 29, 1951.

Summary—"Treated from 3-31-51 to 6-28-51. At present time left foot is improving, but whether it can be permanently preserved without amputation is still a moot question otherwise his progress is slow but satisfactory."

Doctor: H. G. Romig—June 29, 1951.

Summary—"Further treatment needed."

Doctor: H. G. Romig—August 17, 1951.

Summary—"The right leg is largely useless due to a slowly-healing foot wound. Furthermore the foot and ankle on this side are almost

without sensation even though healed over by scar."

"The man is totally disabled. The foot will heal in a matter of months—how many I cannot say. When healed he will be disabled to a very, very high degree."

Doctor: H. G. Romig—May 2, 1952.

Summary—"This man was injured 9-21-50, while working for the Chugach Electric Association. As a result he lost his left arm below the shoulder, lost right leg below the knee. His left foot was amputated at the level of the articulation of the toes.

"The right leg and left arm with artificial limbs work as well as could be expected. The left foot however has failed to heal. Any use of the foot causes breakdown and slough of the tissues.

"On the whole the circulation of the left foot is better. Yet weight bearing causes necrosis and slough.

"My plans for treatment would encompass any or possibly all the following procedures: (1) rehospitiation, (2) sympathectomy, (3) reamputation and (or) large thick graft.

"I estimate that these procedures would be time consuming and very expensive; and yet they will be necessary to restore him to some

percentage level of occupational ability. As it is, there is little he can do towards making a living. His case has reached a static level as an outpatient. I believe the above-outlined procedures should be instituted soon."

Permanent total disability compensation in the amount of \$8,100.00 was paid on July 25, 1951, but from that indemnity the insurance carrier withheld the sum of \$3,645.00 which previously had been paid as temporary disability compensation.

No further compensation for temporary disability was paid although no medical and result had been obtained or has been obtained to this date.

Compensation for temporary total disability for the entire period of such disability after thirty-eight weeks is now due applicant, and, in addition thereto, the sum of \$3,645.00 previously withheld from the statutory payment for loss of one arm and leg.

Award

From the foregoing facts applicant Carl E. Jenkins is awarded the sum of \$8,100.00 (Eight thousand one hundred dollars), for the permanent loss of one arm and one leg, less the sum of \$4,455.00 (Four thousand four hundred fifty-five dollars), previously paid. Applicant is further awarded compensation for temporary total disability for the period of temporary disablement caused by the failure of his left foot to heal and until a medical end result is reached.

Applicant's attorney's fee is hereby fixed at \$750.00 (Seven hundred fifty dollars).

/s/ HENRY A. BENSON,
Commissioner.

Dated at Juneau, Alaska, November 12, 1952.

Certification

I hereby certify the above and foregoing to be a full, true, and correct copy of the Board Decision and Award issued in the case of Carl E. Jenkins v. Chugach Electric Association and General Accident Fire & Life Assurance Corp., Ltd., Case No. 0-9-370, Docket No. 152.

/s/ S. M. KENNEDY,
For Henry A. Benson,
Chairman.

EXHIBIT No. 5**Alaska Industrial Board****Juneau, Alaska****Case No. 0-9-370****Docket No. 152****CARL E. JENKINS,****Applicant,****vs.****CHUGACH ELECTRIC ASSOCIATION and/or
GENERAL ACCIDENT FIRE & LIFE AS-
SURANCE CORP., LTD.,****Defendants.****DECISION AND AWARD ON REVIEW OF
FULL BOARD AND ORDER SETTING
ASIDE THE AWARD MADE ON NOVEM-
BER 12, 1952, BY HEARING MEMBER
HENRY A. BENSON**

The Decision and Award entered on November 12, 1952, by hearing member Henry A. Benson is hereby set aside and the Board finds that as a result of an accidental injury on September 21, 1950, while employed by the Chugach Electric Association, applicant Carl E. Jenkins suffered temporary total disability during the period September 21, 1950, to October 28, 1950. On approximately October 28, 1950, applicant had the third and final amputation which resulted in the loss of the right arm and leg and all toes except the fifth on the left foot, and

under the provisions of Section 43-3-1 (Loss of Members as Permanent Disability), suffered a total permanent disability. His condition having been rated as a total permanent disability on that date, no compensation for total temporary disability is there-
after payable.

Award

On the basis of the foregoing findings of fact, the Board awards Carl E. Jenkins compensation in the sum of \$476.70 representing temporary total disability compensation for a period of 35 days.

.....
NEIL F. MOORE.

.....
J. GERALD WILLIAMS.

Juneau, Alaska, February 6, 1953.

Certificate

I hereby certify the foregoing to be a true and correct copy of Decision and Award on Review of Full Board and Order Setting Aside the Award Made on November 12, 1952, by Hearing Member Henry A. Benson in the case of Carl E. Jenkins vs. Chugach Electric Association and/or General Accident Fire & Life Assurance Corp., Ltd., Case No. 0-9-370, Docket No. 152.

/s/ **HENRY A. BENSON,**
Chairman.

EXHIBIT No. 6

Territory of Alaska

Alaska Industrial Board

Application for Adjustment of Claim.

Alaska Workmen's Compensation Act

CARL E. JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC ASSOCIATION &
GENERAL ACCIDENT FIRE & LIFE
ASSURANCE CORP., LTD.,

Defendant.

1. Carl E. Jenkins, while employed as lineman on Sept. 21, 1950, at Anchorage, Alaska, by Chugach Electric Assn., who is subject to the Act, sustained injury arising out of and in the course of said employment, resulting in electrical burns, resulting in loss of left arm, badly burned left foot. Four toes on left foot amputated. Right leg amputated below knee.

2. Injured, left work on 9/21/50, and disability continued to present time.

3. Last payment of compensation on; last medical furnished by employer on Sept. 21, 1951. Notice of injury given employer immediately.

4. Medical and surgical treatment has been rendered by Dr. Romig, Anchorage, Aaa., Dr. Ed-

munds, Virginia Mason Hospital, Seattle, Wash.; furnished by Chugach Electric Association, Anchorage, Aaa.

5. Employee's wages were \$3.10 per hour, working 3 hours per day, 6 days per week.

6. Total compensation paid to date, \$8,100.00. (Received additional check, \$476.00, but not cashed.)

7. Injured was married and had 2 dependents, as follows: Doris C. Jenkins, wife; C. Edward Jenkins, son.

8. (To be used in death cases only.)

9. A question has arisen with respect to the liability of the employer or insurance carrier, or the amount owed and the reason for filing this application is: Believe entitlement to temporary disability, until there is an end to disability, through medical means. Opinion based Court Case No. 12, Alaska No. 584, Libby, McNeil, Libby, Alaska Indus. Board.

Wherefore, it is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.

Dated at Anchorage, Nov. 21, 1953.

/s/ CARL E. JENKINS.

EXHIBIT No. 7

Territory of Alaska
Alaska Industrial Board

Case No. 0-9-370

Docket No. 152

CARL E. JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC ASSOCIATION and
GENERAL ACCIDENT FIRE & LIFE
ASSURANCE CORPORATION, LTD.,

Defendants.

MOTION AND ANSWER

Chugach Electric Association and General Accident Fire & Life Assurance Corporation, Ltd., hereby move to strike and answer that certain Application for Adjustment of Claim dated November 21, 1953, made by Carl E. Jenkins, for the reasons and as follows:

On February 6, 1953, the Alaska Industrial Board rendered its Decision and Award, finding that applicant Jenkins had suffered temporary total disability during the period September 21, 1950, to October 28, 1950, and on October 28, 1950, had suffered total permanent disability under the provisions of Section 43-3-1, A. C. L. A. 1949, and that Jenkins was entitled to temporary disability compensation of \$476.70; that in accordance with said Decision and Award, the defendants heretofore paid Jenkins \$8,100.00 in full payment of his total per-

manent disability compensation, and also gave him a draft, payable in lawful money of the United States of America, for \$476.70, in full payment of the temporary total disability so awarded him by the Board;

That in his said Application, said Jenkins admits he has been paid said \$8,100.00 and also that he had received said additional check for \$476.70, but had not cashed it;

That said Jenkins never took any appeal from the Board's Decision and Award of February 6, 1953, to the District Court for the Territory of Alaska;

That said draft for \$476.70 is still valid and will be honored upon presentment for payment;

That the Board's said Decision and Award of February 6, 1953, is res judicata; that the defendants have fully complied with its provisions; and that the Board has no jurisdiction of the claim asserted by said Jenkins in his said application of November 21, 1953, which is based upon the same injury upon which was based said Jenkins' original application, upon which the Board awarded him compensation in its said Decision and Award of February 6, 1953.

Dated at Juneau, Alaska, December 9, 1953.

ROBERTSON, MONAGLE &
EASTAUGH.

By /s/ R. E. ROBERTSON,
Attorneys for Defendants.

EXHIBIT No. 8

Alaska Industrial Board

Juneau, Alaska

Case No. 0-9-370

Docket No. 252

CARL E. JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC CO., and/or GENERAL
ACCIDENT FIRE & LIFE ASSURANCE
CO., LTD.,

Defendants.

DECISION

This matter came on to be heard by the Full Board pursuant to the Application of Carl E. Jenkins. Applicant was represented by attorney John Dimond and defendants by attorney R. E. Robertson of counsel Robertson, Monagle & Eastaugh.

Decision

From the files and records in the case and medical reports the Full Board finds a condition of temporary total disability existed on October 29, 1950, and continues to this date, no end medical result having been reached.

/s/ HENRY A. BENSON,
Chairman.

/s/ NEIL F. MOORE.

/s/ J. GERALD WILLIAMS.

January 8, 1954.

Certification

I hereby certify the above and foregoing to be a full, true and correct copy of the Decision in the case of Carl E. Jenkins vs. Chugach Electric Co., and/or General Accident Fire & Life Assurance Co., Ltd., Case No. 0-9-370, Docket No. 252.

/s/ HENRY A. BENSON.

January 8, 1954.

[Endorsed]: Filed February 20, 1954.

In the District Court for the District of Alaska,
Division Number One, at Juneau

No. 6994-A

**CHUGACH ELECTRIC ASSOCIATION, INC., a
Corporation, et al.,**

Plaintiffs,

vs.

**ALASKA INDUSTRIAL BOARD and CARL E.
JENKINS,**

Defendants.

**ANSWER OF DEFENDANT
CARL E. JENKINS**

Defendant, Carl E. Jenkins, answers plaintiff's complaint as follows:

1. Defendant admits all the material allegations contained in paragraphs 1, II, IV, V, VI, VII, IX, and XI.

2. Answering paragraph III, defendant admits all the material allegations contained therein with the exception of the allegation "that subsequently on or about August 28, 1951, said Board, without notifying Plaintiffs, returned said Application to said Defendant Jenkins"; with respect to such allegation, defendant is without knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same.

3. Answering paragraph VIII, defendant admits that he was paid the sums of \$8,100.00 and \$476.70, respectively, but denies that both payments were made after the Decision and Award of February 6, 1953. The real facts with respect to such payments are: Following the accident of September 21, 1950, temporary disability compensation payments were made to defendant at the rate of \$95.34 per week for approximately 38 weeks, until the total sum of \$3,645.00 had been paid; at this time such payments were discontinued by the insurance carrier above named on the advice of counsel. Thereafter, on July 21, 1951, said carrier paid defendant the sum of \$4,455.00, this representing the amount that he was entitled to under law for total and permanent disability (\$8,100.00) minus payments previously made for temporary disability compensation (\$3,645.00). The \$476.70 was paid to defendant following the Decision and Award of February 6, 1953.

Regarding the allegation in paragraph VIII as to medical, surgical and hospital expenses in the sum of \$15,204.78, defendant is without knowledge

or information sufficient to form a belief as to the truth of such allegation and therefore denies the same.

4. Answering paragraph X, defendant admits the allegations therein with the exception of the allegation "that none of the facts in said Motion and Answer have ever been controverted," which allegation defendant denies.

5. Defendant denies the allegations contained in paragraph XII.

6. Defendant admits the allegations in paragraph XIII.

Wherefore, defendant prays that plaintiffs' complaint be dismissed and the Decision of the Alaska Industrial Board of January 8, 1954, be affirmed.

Dated at Juneau, Alaska, this 1st day of March, 1954.

/s/ JOHN H. DIMOND,
Attorney for Defendant,
Carl E. Jenkins.

Copy received this 1st day of March, 1954.

ROBERTSON, MONAGLE &
EASTAUGH.

By. /s/ M. E. MONAGLE,
Attorneys for Plaintiffs.

/s/ J. GERALD WILLIAMS,
Attorney General of Alaska.

[Endorsed]: Filed March 1, 1954.

[Title of District Court and Cause.]

OPINION

Dated July 27, 1954

The question presented by this controversy is whether, after making an award for permanent total disability for the loss of an arm and a leg, the Industrial Board is precluded at a later date from allowing benefits for temporary disability because of the failure of an additional injury, concurrently sustained, to heal.

On July 21, 1950, the employee received an electrical shock and was severely burned. On October 28, 1950, the left arm, right leg, and four toes of the left foot were amputated. On November 12, 1952, the Board, by one member, awarded him the maximum of \$8,100.00 for permanent total disability and the statutory allowance for temporary total disability until his foot healed. On February 6, 1953, this award was vacated by the other members of the Board who found that the employee was entitled to temporary total disability from the date of his injury to October 28, 1950, only, when, according to its findings, he became permanently and totally disabled. On November 21, 1953, the employee applied for temporary disability benefits which he asserted he was entitled to receive until his foot healed. On January 8, 1954, over the objections of the employer and insurer, the Board granted this application.

The burns received by the employee were severe, necessitating medical, hospital, surgical, and other services at a cost of more than \$15,000.00, which the employer has paid. It perhaps should be noted at this point that, if the decision of the Board is affirmed, the additional temporary disability benefits will amount to more than \$15,000.00.

The plaintiffs contend: (1) that the Board has no power to grant a rehearing; (2) that the decision of February 6, 1953, is res judicata of the proceedings on the application of November 21, 1953; (3) that the application of November 21, 1953, was barred by the limitations of the statute governing the initial filing of claims and their subsequent modification; and (4) that no award for temporary disability may be made after a finding of permanent total disability.

The defendants contend that the award may be sustained under the provisions of Sec. 43-3-4, ACLA 1949, vesting continuing jurisdiction in the Board over every claim, together with power to modify its awards. No authority is cited for or against the proposition that, where injuries, sufficient by themselves to constitute permanent total disability, are the basis of the maximum award for such disability, an allowance may nevertheless thereafter be made for temporary disability based on the failure of an additional injury, concurrently sustained, to heal; and it may well be doubted whether any authority exists in view of the extraordinary nature of the factual situation.

I am of the opinion that the award must be set aside. The failure of the foot to heal was known not only after the expiration of the normal period for healing but also after the expiration of 38 months, when the instant award was made. The power vested in the Board under Sec. 43-3-4 to modify its awards may be invoked only upon a showing of a subsequent development warranting the exercise of that power. Even if it could be held that the failure of the foot to heal between February 6, 1953, and November 21, 1953, was such a subsequent development, it is not perceived how, after the maximum allowance for permanent total disability had been made on February 6, 1953, an allowance for temporary disability could thereafter be made either under Sec. 43-3-1 or Sec. 43-3-4. Permanent total disability is the ultimate in disability under the law. Further injury, concurrently sustained, could not add to or increase that degree of statutory disability, although it might well show a greater degree of actual disability.

The difficulty with the defendants' case here is that it apparently confuses the two kinds of disability, whereas the law concerns itself with only one. Perhaps the Board could have kept the employee in a temporary disability status until all his injuries, those which in themselves were sufficient to constitute permanent total disability, before making a finding of permanent total disability, well as the injury to the foot, had healed or become permanent total disability under the law, as

disability. Having failed to do so, it may not thereafter make a finding of the existence of a lesser degree of disability and allow compensation therefor, because obviously such lesser degree is included in the greater.

It will be noted that the law makes no provision for injuries sustained in addition to those which suffice to constitute permanent total disability. While this might have been an oversight upon the part of the Legislature, it could also have been an intentional omission in view of the fact that, since the body functions as a unit, it would be illogical to deal separately with an injury which it is not necessary to take into account in finding permanent total disability and allocate to such additional injury a lesser degree of disability. No prejudice results from such an omission, because the employer is required to furnish medical, surgical-hospital, and other services, except where the injured employee, as in the instant case, requires treatment beyond the period of time for which such services are required to be furnished.

I am of the opinion, therefore, that under the law of Alaska the only remedy afforded, where there is a failure to heal after an allowance has been made for permanent total disability, is that provided by Sec. 43-3-2. In the instant case it appears that the employer complied with the provisions of that section for more than the statutory period and that, even with the extension in 1953, of this period from

one to two years, it would still be insufficient for this case.² It thus appears that, in permitting the Board to keep an injured employee in a temporary disability status until his condition has become fixed or stabilized, ample provision has been made for cases in which the disability is less than permanently total but that no provision has been made for cases in which there is a failure to heal after a finding of permanent total disability. Such being the state of the law, the Court has no alternative but to set aside the award appealed from.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed July 27, 1954.

In the U. S. District Court for the District of
Alaska, Division Number One, at Juneau

No. 6994-A

**CHUGACH ELECTRIC ASSOCIATION, INC., a
Corporation, and GENERAL ACCIDENT
FIRE & LIFE ASSURANCE CORPORA-
TION, LTD., a Corporation,**

Plaintiffs,

vs.

**ALASKA INDUSTRIAL BOARD, Composed of
the Territorial Commissioner of Labor,
HENRY A. BENSON, the Territorial Insur-
ance Commissioner, NEIL F. MOORE, and the
Attorney General of Alaska, J. GERALD
WILLIAMS; and CARL E. JENKINS,**

Defendants.

JUDGMENT AND DECREE

This cause, by agreement of counsel for the respective parties, having heretofore been submitted upon briefs of counsel for the respective parties, upon plaintiff's appeal from the Decision of the Alaska Industrial Board, of January 8, 1954, the Alaska Industrial Board appearing not, and the Court having on July 27, 1954, made and filed its written Opinion herein, and being now fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the Alaska Industrial Board's Decision made

and entered on January 8, 1954, be and it is hereby vacated and set aside, and the defendant Alaska Industrial Board and its members Henry A. Benson, Neil F. Moore, and J. Gerald Williams, and the defendant Carl E. Jenkins be and they are hereby permanently enjoined from doing any act or thing to compel plaintiffs to pay any sum whatsoever to said defendant Jenkins under or by virtue of said Board's Decision of January 8, 1954.

Done in open Court this 30th day of July, 1954.

/s/ GEORGE W. FOLTA,
Judge.

[Endorsed]: Filed in Open Court July 30, 1954.

[Title of District Court and Cause.]

MOTION FOR REHEARING

Defendant, Carl E. Jenkins, moves that the judgment and decree entered herein be vacated and set aside and that a rehearing be granted upon the following grounds:

1. That the Court was in error in holding, as it appears from its written opinion, that the law makes no provision for injuries sustained in addition to those which suffice to constitute permanent total disability.
2. That the Court was in error in holding, as it appears from its written opinion, that the law does not permit the Alaska Industrial Board to keep an injured employee in a temporary disability status until his condition has become fixed or stabilized in

those cases in which there is a failure to heal after a finding of permanent total disability.

Dated at Juneau, Alaska, this 3rd day of August, 1954.

/s/ JOHN H. DIMOND,

Attorney for Defendant,

Carl E. Jenkins.

Affidavit of Mailing attached.

[Endorsed]: Filed August 6, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that above-named defendants hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree entered in this action on July 30, 1954.

Dated at Juneau, Alaska, this 29th day of October, 1954.

/s/ JOHN H. DIMOND,

Attorney for Defendant,

Carl E. Jenkins.

J. GERALD WILLIAMS,

Attorney General of Alaska;

By /s/ EDWARD A. MERDES,

Assistant Attorney General, Attorney for Alaska
Industrial Board.

[Endorsed]: Filed October 30, 1954.

[Title of District Court and Cause.] ~

MINUTE ORDER MADE ON OCTOBER 7, 1954

Defendant Jenkins' Motion for Rehearing having been submitted to the court on briefs, the court at this time rules that said motion for a rehearing was denied.

[Title of District Court and Cause.]

COST BOND ON APPEAL

The above-named defendant, Alaska Industrial Board, as principal, and the American Surety Company of New York, a New York corporation, as surety, jointly and severally acknowledge that they and their successors and assigns are jointly and severally bound unto the above-named plaintiffs in the sum of \$250.00.

The condition of this bond is as follows:

Whereas, the defendant, Alaska Industrial Board, has appealed to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree entered in this action on July 30, 1954;

Now, Therefore, if the said defendant, Alaska Industrial Board, shall prosecute its appeal to effect and pay all costs that may be adjudged against it if the appeal is dismissed or if the judgment is affirmed or modified, then this bond shall be void; otherwise, to be and remain in full force and effect.

Dated: November 2, 1954.

ALASKA INDUSTRIAL
BOARD,

By /s/ HENRY A. BENSON,
Chairman.

[Seal]

AMERICAN SURETY
COMPANY OF NEW YORK,

By /s/ JOSEPH A. McLEAN,
Attorney in Fact.

[Endorsed]: Filed November 2; 1954.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That The Undersigned, Alaska Industrial Board, composed of the Territorial Commissioner of Labor, Henry A. Benson; the Territorial Insurance Commissioner, Neil F. Moore; and the Attorney General of Alaska, J. Gerald Williams; and Carl E. Jenkins, in the above-entitled action, as Principals, and Fireman's Fund Indemnity Company, a corporation organized under the laws of the State of California, and authorized to transact business of surety in the Territory of Alaska, as Surety, are held and firmly bound unto the above-entitled Chugach Electric Association, Inc., a corporation, and General Accident Fire & Life Assurance Corporation, Ltd., a corporation, in the penal sum of Two Hundred Fifty and No/100 Dollars (\$250.00), lawful money of the

United States for the payment of which well and truly to be made, the said Principals and the said Surety bind themselves, their heirs and personal representatives or successors jointly and severally, firmly by these presents.

Dated and Sealed This 4th day of November, 1954.

Whereas, on the day of, 19, the above-entitled Court rendered and entered a judgment or decree in the above-entitled cause in favor of the above-named obligees and against the above-named principals;

And Whereas, the said appellants feeling aggrieved by said judgment or decree and desiring to appeal from the same to the United States 9th Circuit Court of Appeals; and perfect said appeal by this bond.

Now, Therefore, the condition of the above obligation is such, that if the said appellants will pay all costs and damages that may be awarded against them on said appeal or on the dismissal thereof, not exceeding Two Hundred Fifty and No/100 (\$250.00) Dollars, then this obligation shall be void, otherwise to remain in full force and virtue.

[Seal]

.....
 FIREMAN'S FUND
 INDEMNITY COMPANY,

By /s/ ANN H. HODNETT,
 Attorney-in-Fact.

[Endorsed]: Filed November 8, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY DEFENDANTS

Defendants propose on their appeal to the United States Court of Appeals in the above cause to rely upon the following points as error:

1. The court erred in holding that after defendant, Carl E. Jenkins, had received the maximum allowance for permanent total disability on February 6, 1953, that the Alaska Industrial Board could not thereafter make a finding of, and an allowance of compensation for, temporary disability either under Section 43-3-1 or 43-3-4, Alaska Compiled Laws Annotated, 1949.

2. The court erred in holding that permanent total disability is the ultimate disability under the Alaska Workmen's Compensation Law.

3. The court erred in holding that the Alaska Workmen's Compensation Law makes no provision for injuries sustained in addition to those which suffice to constitute permanent total disability.

4. The court erred in holding that under the Alaska Workmen's Compensation Law the only remedy afforded, where there is a failure to heal after an allowance has been made for permanent total disability, is that provided by Section 43-3-2, Alaska Compiled Laws Annotated, 1949.

5. The court erred in holding that the Alaska Workmen's Compensation Law does not permit the

Alaska Industrial Board to keep an injured employee in a temporary disability status until his condition has become fixed or stabilized in cases where there is a failure to heal after a finding has been made of permanent total disability.

6. The court erred in entering its judgment and decree of July 30, 1954, vacating and setting aside the Alaska Industrial Board's decision of January 8, 1954, and in enjoining the defendants from doing any act or thing to compel plaintiffs to pay any sum whatsoever to defendant, Carl E. Jenkins, under or by virtue of the said Board's decision of January 8, 1954.

7. The court erred in entering its minute order of October 7, 1954, denying defendants' motion for rehearing.

Dated at Juneau, Alaska, this 20th day of December, 1954.

/s/ JOHN H. DIMOND,

Attorney for Defendant

Appellant, Carl E. Jenkins.

J. GERALD WILLIAMS,

Attorney General of Alaska,

By /s/ EDWARD A. MERDES,

Assistant Attorney General; Attorney for Defendant-Appellant, Alaska Industrial Board.

Service of Copy acknowledged.

[Endorsed]: Filed December 21, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Territory of Alaska,
First Division ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and Orders of the Court filed in the above-entitled cause and are the ones designated by the parties hereto to constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 8th day of January, 1955.

J. W. LEIVERS,

Clerk of the District Court;

By /s/ P. D. E. McIVER,

Chief Deputy Clerk of Court.

[Endorsed]: No. 14616. United States Court of Appeals for the Ninth Circuit. Alaska Industrial Board, Composed of Henry A. Benson, Territorial Commissioner of Labor; Neil F. Moore, Territorial Insurance Commissioner, and J. Gerald Williams, Attorney General of Alaska; and Carl E. Jenkins, Appellants, vs. Chugach Electric Association, Inc., a Corporation; and General Accident Fire and Life Assurance Corporation, Ltd., a Corporation, Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, First Division.

Filed January 10, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14616

ALASKA INDUSTRIAL BOARD, Composed of
the Territorial Commissioner of Labor, HEN-
RY A. BENSON; the Territorial Insurance
Commissioner, NEIL F. MOORE; and the At-
torney General of Alaska, J. GERALD WIL-
LIAMS; and CARL E. JENKINS,

Appellants.

vs.

CHUGACH ELECTRIC ASSOCIATION, INC.,
a Corporation, and GENERAL ACCIDENT
FIRE & LIFE ASSURANCE CORPORA-
TION, LTD., a Corporation,

Appellees.

APPELLANTS' STATEMENT OF POINTS
AND DESIGNATION OF PARTS OF REC-
ORD TO BE PRINTED

Appellants above named adopt the "statement of
points to be relied upon by defendants," filed with
the Clerk of the District Court, as their statement
of points to be relied upon in the United States
Court of Appeals for the Ninth Circuit, and pray
that the whole of the record as filed and certified be
printed.

Dated December 20, 1954.

/s/ JOHN H. DIMOND,

Attorney for Appellant,
Carl E. Jenkins.

J. GERALD WILLIAMS,

Attorney General of Alaska;

By /s/ EDWARD A. MERDES,

Attorney for Appellant,
Alaska Industrial Board.

Service of Copy acknowledged.

[Endorsed]: Filed January 10, 1955.

No. 14616

United States
Court of Appeals
For the Ninth Circuit.

ALASKA INDUSTRIAL BOARD, Composed of
HENRY A. BENSON, Territorial Commissioner of Labor; **NEIL F. MOORE,** Territorial Insurance Commissioner, and **J. GERALD WILLIAMS,** Attorney General of Alaska, and **CARL E. JENKINS,**

Appellants,

VS.

CHUGACH ELECTRIC ASSOCIATION, INC., a Corporation, and **GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD.,** a Corporation,

Appellees.

Supplemental
Transcript of Record

Appeal from the District Court for the District of Alaska
First Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Form AIB No. 104AB

Final Report

Physician's Report of Injury

to the

Territory of Alaska

Alaska Industrial Board

Box 2141 Juneau

This report to be filed forthwith
after first attendance.

The Patient

1. Name of Injured Person: Carl Jenkins.
- 1a. Occupation when injured: Electrician. Age:
42. Married or Single: M. Sex: M.
2. Address: City or Town:
Anchorage, Aaa.
3. Name of Employer: Chugach Electric Assn.
Business: Elec. Distribution.
4. Address of Employer: Box 488. City or Town:
Anchorage.
5. Insured by: Name of Company: Bud Nock,
Box 1313, Anchorage.

The Accident

6. Date of Accident: 9-21-50. Hour: 1:30 p.m.
Date disability began: 9-21-50.
7. State in patient's own words where and how
accident occurred: Working on 12,000-volt stuff,
came to on the ground.

The Injury

8. Give accurate description of nature and extent
of injury and state your objective findings: 3rd de-

gree burns of left arm at the elbow down to the bone, no pulse, no sensation of the lower arm. Deep 2nd and 3rd degree burns of the left upper arm, elbow to axilla. 2nd degree burns of right forearm. 3rd degree burns of both feet, with varying degrees up ankles.

9. Will the injury result in (a) Permanent defect? Yes. If so, what? Loss of toes and feet in part. Loss of left lower arm. (b) Facial or head disfigurement? No.

10. Is accident above referred to the only cause of patient's condition? Yes. If not, state contributing causes

11. Is patient suffering from any disease of the heart, lungs, brain, kidneys, blood, vascular system or any other disabling condition not due to this accident? Yes. Give particulars: Temporary cardiac irregularity after accident. Did accident aggravate this condition?

12. Has patient any physical impairment due to previous accident or disease? No. Give particulars

13. Has normal recovery been delayed for any reason? No. Give particulars

Treatment

14. Date of your first treatment: 9-21-50. Who engaged your services? Employer.

15. Describe treatment given by you: Sterile debridement and dressing, antibiotics topically and systemically, plasma, glucose, morphine.

16. Were X-rays taken? No. By whom?
..... When?

17. X-ray diagnosis
- 18.* Was patient treated by anyone else?.....
By whom? (name and address).....
When?.....
19. Was patient hospitalized? Yes. Name and address of hospital: Providence, Anchorage, Aaa.
20. Date of admission to hospital: 9-21-50. Date of discharge: 9-28-50.
21. Is further treatment needed? Yes. For how long? Refer to Dr. Edmunds.

Disability

22. Patient was/will be able to resume regular work on: Unknown.
23. Patient was/will be able to resume light work on: Unknown.
24. If death ensued, give date.....

Give any information of value not included above on back of this sheet.

I am a duly licensed physician in the State of California-Alaska.

Physician's name: H. G. Romig, M.D.

/s/ H. G. ROMIG.

Address: Box 373, Anchorage, Alaska.

Date of this report: 10-2-50.

[Stamped]: Received October 12, 1950, Terr.
Dept. of Labor.

*18. Referred to Dr. Louis Edmunds, Virginia Mason Hosp., Seattle, Washington, September 28, 1950.

Form AIB No. 104AB.

First Report—Case Reopened

Physician's Report of Injury

to the

Territory of Alaska

Alaska Industrial Board

Box 2141 Juneau

This report to be filed forthwith after first attendance. This form may also be used for submitting supplemental information.

The Patient

1. Name of Injured Person: Mr. Carl Jenkins.
- 1a. Occupation when injured: Electrician. Age: 43. Married or Single: M. Sex: M.
2. Address: Box 1073. City or Town: Anchorage, Aaa.
3. Name of Employer: Chugach Electric Assn. Business: Electric.
4. Address of Employer: Box 488. City or Town: Anchorage, Aaa.
5. Insured by: Name of Company: General Accident.

The Accident

6. Date of Accident: 9-21-50. Hour: 1:30 p.m. Date disability began: 9-21-50.
7. State in patient's own words where and how accident occurred: Was working on 12,000-volt stuff—came to on the ground.

The Injury

8. Give accurate description of nature and extent of injury and state your objective findings: See reports from Virginia Mason Clinic—Dr. Edmunds.

9. Will the injury result in (a) Permanent defect? Yes. If so, what?.....

(b) Facial or head disfigurement?.....

10. Is accident above referred to the only cause of patient's condition? Yes. If not, state contributing causes

11. Is patient suffering from any disease of the heart, lungs, brain, kidneys, blood, vascular system or any other disabling condition not due to this accident? No. Give particulars.....

Did accident aggravate this condition?.....

12. Has patient any physical impairment due to previous accident or disease? No. Give particulars.....

13. Has normal recovery been delayed for any reason? No. Give particulars.....

Treatment

14. Date of your first treatment: 3-31-51. Who engaged your services? Company.

15. Describe treatment given by you: Examination—dressings—crutches.

16. Were X-rays taken? Yes. By whom? (name and address): Anchor. Med. & Surg. Clinic. When? 5-24-51.

17. X-ray diagnosis: No osteomyelitis.

18. Was patient treated by anyone else? Yes.
By whom? (name and address): Dr. Edmunds.
When?.....

19. Was patient hospitalized?..... Name
and address of hospital: Not this time.

20. Date of admission to hospital:
Date of discharge:

21. Is further treatment needed? Yes. For how
long?

Disability

22. Patient was/will be able to resume regular
work on: Indefinite.

23. Patient was/will be able to resume light
work on:

24. If death ensued, give date:

Give any information of value not included
above on back of this sheet.

I am a duly licensed physician in the State of
California-Alaska.

Physician's name: H. G. Romig, M.D.

/s/ H.G.R.

Address: Box 373, Anchorage, Aaa.

Date of this report: 6-29-51.

[Stamped]: Received June 10, 1951, Terr. Dept.
of Labor.

Anchorage Medical and Surgical Clinic
4th Ave. and L Street
Box 373
Anchorage, Alaska

Asa L. Martin, M.D.

Howard G. Romig, M.D.

July 18, 1952.

Mr. John Shaw,
Palmer, Alaska.

Re: Carl Jenkins.

Date of Injury: 9-21-50.

Employer: Chugach Electric Assoc.

Dear Sir:

This man was injured 9-21-50 while working for the Chugach Electric Association. As a result he lost his left arm below the shoulder, lost right leg below the knee. His left foot was amputated at the level of the articulation of the toes.

The right leg and left arm with artificial limbs work as well as could be expected. The left foot, however, has failed to heal. Any use of the foot causes breakdowns and slough of the tissues.

On the whole, the circulation of the left foot is better, yet weight bearing causes necrosis and slough.

My plans for treatment would encompass any or possibly all the following procedures: (1) rehospitalization, (2) sympathectomy, (3) reamputation and (or) large thick graft.

I estimate that these procedures would be time-consuming and very expensive, and yet they will be necessary to restore him to some percentage level of occupational ability. As it is, there is little he can do towards making a living. His case has reached a static level as an out-patient. I believe the above-outlined procedure should be instituted soon.

Sincerely,

/s/ H. G. ROMIG.

H. G. Romig, M.D.

HGR/am.

cc: Mr. Jenkins.

[Stamped]: Received August 13, 1952, Alaska Industrial Board.

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE E. HALE

United States of America,
Territory of Alaska—ss.

George E. Hale, being first duly sworn on oath, deposes and says: I am a duly licensed physician and surgeon and practicing in the Territory of Alaska; I have had 61½ years' experience in orthopedics, including residency; on January 8, 1953, I made a thorough medical examination of Carl E. Jenkins; in my professional opinion, said Jenkins is now permanently totally disabled and became permanently totally disabled on the date of his accident,

which he informed me was on September 21, 1950, and his permanent total disability was confirmed on the respective dates of the amputation of his herein-after-mentioned limbs, which he informed me were: September 30, 1950, left arm amputated 4 inches below shoulder; 10 to 14 days later all toes, except the fifth, were amputated on his left foot, and 10 to 14 days later his right leg was amputated at the mid-thigh level.

/s/ GEORGE E. HALE.

Subscribed and Sworn to before me in Anchorage, Alaska, January 30, 1953.

[Seal] /s/ RAYMOND E. PLUMMER,
Notary Public for Alaska.

My commission expires 3/30/53.

Received February 2, 1953.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO SUPPLEMENTAL TRANSCRIPT

United States of America,
Territory of Alaska, Division No. 1—ss.

I, J. W. Leivers, Clerk of the District Court for the District of Alaska, Division Number One, hereby certify that hereunto attached are the following original documents on file in the above-entitled action, viz.:

Doctor H. G. Romig's Physician's Report of Injury to Alaska Industrial Board, dated October 2, 1950;

Doctor H. G. Romig's Physician's Report of Injury to Alaska Industrial Board, dated June 29, 1951;

Doctor H. G. Romig's letter of July 18, 1952, to Attorney John D. Shaw;

Doctor G. E. Hale's affidavit of January 30, 1953, which are herewith certified and returned by me as a Supplemental Transcript at the request of Plaintiffs to the Honorable United States Court of Appeals for the Ninth Circuit for inclusion in the record on appeal herein.

In Witness Whereof I have hereunto set my hand and affixed the seal of the above-entitled Court in Juneau, Alaska, this 16th day of June, 1955.

[Seal] /s/ J. W. LEIVERS,
Clerk of the District Court.

Copy received June 16, 1955.

/s/ JOHN H. DIMAL,
Attorney for Defendant,
Carl E. Jenkins.

Affidavit of Mail attached.

[Endorsed]: Filed June 16, 1955.

[Endorsed]: No. 14,616. United States Court of Appeals for the Ninth Circuit. Alaska Industrial Board; Composed of Henry A. Benson, Territorial Commissioner of Labor; Neil F. Moore, Territorial Insurance Commissioner, and J. Gerald Williams, Attorney General of Alaska, and Carl E. Jenkins, Appellants, vs. Chugach Electric Association, Inc., a Corporation, and General Accident, Fire & Life Assurance Corporation, Ltd., a Corporation, Appellees. Supplemental Transcript of Record. Appeal From the District Court for the District of Alaska, First Division.

Filed June 18, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[fol. 84] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
February 14, 1956 (omitted in printing)

[fol. 85] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: Denman, Chief Judge and Stephens, Healy,
Pope, Lemmon, Fee, Chambers and Hamley, Circuit Judges.

MINUTE ENTRY OF ORDER REASSIGNING CAUSE FOR HEARING
EN BANC—July 23, 1956

By direction of Denman, Chief Judge, and Stephens,
Pope, Lemmon, Chambers and Hamley, Circuit Judges,

It is ordered that the above case be reheard in banc.

The same shall be submitted, after oral argument, upon
the briefs filed in the division hearing the appeal together
with a further brief to be filed by each party within twenty
days from the making of this order if a party so desires.

[fol. 86] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: Denman, Chief Judge, and Stephens, Healy,
Pope, Lemmon, Fee, Chambers, Barnes, and Hamley,
Circuit Judges.

MINUTE ENTRY OF REARGUMENT AND RESUBMISSION—
November 20, 1956

Ordered appeal herein reargued by Mr. J. Gerald
Williams, Attorney General, Territory of Alaska, counsel
for the Appellants, and by Mr. F. O. Eastaugh, counsel
for the Appellees, and resubmitted to the Court for con-
sideration and decision.

[fol. 87] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: Denman, Chief Judge, and Stephens, Healy,
Pope, Lemmon, Fee, Chambers, Barnes, and Hamley,
Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINIONS
AND FILING AND RECORDING OF JUDGMENT—April 29, 1957

Ordered that the typewritten opinion, and dissenting opinions of Denman, Chief Judge, and Pope, Circuit Judge, this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the majority opinion rendered.

[fol. 88] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14,616

ALASKA INDUSTRIAL BOARD, and
CARL E. JENKINS, Appellants,

v.

CHUGACH ELECTRIC ASSOCIATION, INC., a corporation and
GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., a corporation, Appellees.

Appeal from the District Court for the District of
Alaska, First Division.

OPINION—April 29, 1957

Before: Denman, Chief Judge, and Stephens, Healy,
Pope, Lemmon, Fee, Chambers, Barnes, and Hamley,
Circuit Judges.

HAMLEY, Circuit Judge:

In this case, which arises under the Workmen's Compensation Act of Alaska, two questions are presented on appeal. The first of these is whether, under the circumstances of this case, the Alaska Industrial Board had jurisdiction to reopen a previously-rejected claim for a temporary total disability award. The second is whether, if the board had such jurisdiction, it correctly granted such an award for injuries arising from the same accident

in which a lump-sum award for permanent total disability had previously been granted.

— The following facts, essential to a consideration of these questions, are not in dispute. On September 21, 1950, Carl E. Jenkins received serious injuries when he came into contact with a high voltage electric line while in the course of his employment. His employer was Chugach Electric Association, which had insured its liability under the act with General Accident Fire & Life Assurance Corporation. [fol. 89] As a result of the accident, it was necessary to amputate Jenkins' left arm near the shoulder, his right leg below the knee, and four toes of his left foot. These amputations were made in a series of three surgical operations, the last of which was performed on October 28, 1950. The left foot failed to heal and was still under treatment at the time of his doctor's last report, on December 17, 1953.

Following this injury, his employer and the insurance company began paying Jenkins compensation for temporary total disability, under the "Temporary Disability" provision of Alaska Comp. Laws Ann., § 43-3-1 (1949). This compensation was paid at the rate of \$95.34 per week, for approximately thirty-eight weeks.

On July 25, 1951, the employer and the insurance company reversed their position. They decided that Jenkins had been permanently and totally disabled since October 28, 1950, when the last amputation (the right leg) occurred. Accordingly, they granted him a lump sum of \$8,100, as a permanent total disability award, but deducted from it the \$3,645 which had been paid to Jenkins as temporary total disability. A check in the sum of \$4,455 was sent to Jenkins on July 25, 1951, for the purpose of closing the claim.

On August 14, 1951, Jenkins filed with the board, on its printed form, an application for adjustment of claim. The evident purpose of this application was to claim continuing benefits for temporary disability, despite the allowance of a lump-sum award for permanent total disability.¹

¹ An amended application was filed on December 10, 1951, correcting the figures originally given for total compensation received.

It was so treated by the employer and insurance company, which filed a joint answer denying that temporary disability continued.

It was also so treated by the chairman of the board, who, on November 12, 1952, filed a decision granting the application. It was held in this decision that temporary disability had continued since October 28, 1950. Jenkins was awarded the \$3,645 which had been deducted from his [fol. 90] lump-sum payment, and continuing temporary disability payments "until a medical end result is reached."

On February 6, 1953, after review by the full membership of the board, the two members other than the chairman filed a decision vacating the chairman's decision and award of November 12, 1952. It was held that, Jenkins' condition having been rated as a total permanent disability on October 28, 1950, "no compensation for total temporary disability is thereafter payable." He was, however, granted a temporary total disability award of \$476.70, **representing compensation for a period of thirty-five days prior to the operation on October 28, 1950.** Jenkins did not seek a district court review of this award, as he might have done under Alaska Comp. Laws Ann., § 43-3-22, (1949).

On May 14, 1953, Jenkins wrote to the chairman of the board, requesting a copy of the decision of February 6, 1953. On November 10, 1953, Jenkins' attorney wrote to the board, requesting that the ~~claim~~ be reopened. On November 21, 1953, Jenkins filed an application for adjustment of claim. He there stated that he was entitled to temporary disability until there was an end to disability through medical means. The employer and the insurance company answered, contending that the decision of February 6, 1953, was res judicata, and that the board was without jurisdiction to reopen the claim.

The board, on January 8, 1954, filed a decision reversing its action of February 6, 1953, holding that a condition of temporary total disability existed on and after October 29, 1950, "no end medical result having been reached." The employer and the insurance company thereupon instituted this action to set aside the board's decision.

In granting judgment for plaintiffs, the district court held that the board was without jurisdiction to reopen

the claim following its decision of February 6, 1953, from which no appeal was taken. Alternatively, it was held that an award for temporary total disability may not be granted for physical disability arising from the same accident in which an award for total permanent disability has been granted.

We will first consider the jurisdictional question which is presented.

[fol. 91] The power and duty of the board with respect to the modification of compensation awards is governed by Alaska Comp. Laws Ann., § 43-3-4 (1949), quoted in the margin.²

Appellees contend that Jenkins did not file a claim, within the meaning of the proviso at the end of § 43-3-4,

² Alaska Comp. Laws Ann., § 43-3-4 (1949):

"Modification of compensation; Continuing jurisdiction: Effect of review upon moneys already paid: Limitation of time. If an injured employee [is] entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under same or some other part of subdivision of this schedule, then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her. To that end the Industrial Board is hereby given and granted continuing jurisdiction of every claim, and said Board may, at any time and upon its own motion or on application, review [sic] any agreement, award, decision or order, and, on such review, may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered, or agreed to, subject to the maximum or minimum provided in this Act. No such review shall affect such award, order or settlement as regards any moneys already paid, except that an award or order increasing the compensation rate may be made effective from date of injury, and except that if any part of the compensation due or to become due is unpaid an award or order decreasing the compensation rate may be made effective from the date of injury, and any payments made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such methods as may be determined by the Industrial Board; provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three (3) years after the injury."

prior to the expiration of the three-year period specified in that proviso. In this connection, it is pointed out that certain medical reports relied upon by appellants as constituting such a claim were dated prior to the hearing resulting in the decision and award of February 6, 1953. It is further argued that Jenkins' letter of May 14, 1953, does not constitute a claim or seek a rehearing. The letter of November 10, 1953, which his counsel filed with the board, and Jenkins' application for adjustment of claim, filed November 21, 1953, were not filed within three years of the injury, which occurred on September 21, 1950.

[fol. 92] Appellees' argument is apparently based upon the premise that, in order to constitute a "claim" within the meaning of the proviso to § 43-3-4, the document must be filed subsequent to the decision establishing the lower rate of compensation. If this premise is correct, we would agree with appellees that such a claim has not been filed within the statutory three-year period. The letter of May 14, 1953, constituting the only document filed subsequent to the decision and prior to the expiration of the three-year period, was a mere inquiry, and not a claim.

But we find nothing in the statutory language warranting the view that, to constitute a "claim" under this proviso, the document must be filed subsequent to the decision establishing the lower rate of compensation. The "claim" referred to in the proviso is not intended to serve the purpose of an application for rehearing. Under § 43-3-4, no such application need be filed, since the board is expressly authorized to review a prior decision "upon its own motion."

All that the "claim" need contain is a request for an increased rate of compensation over that presently in effect. Jenkins' application of August 14, 1951, amended on December 10, 1951, contained such a request. It was so treated by the employer and insurer in their answer, by the chairman in his decision of November 12, 1952, and by the board in its decision of February 6, 1953. Both the original and amended applications were filed within three years after the injury.

It is of no consequence that the board may actually have reopened the matter in response to Jenkins' insufficient

letter of May 14, 1953, or his tardy claims of November 10 and 21, 1953. Since the board had power to reopen the matter on its own motion, and since it did desire to reopen, the action taken is to be deemed a reopening on the board's own motion.

We hold that Jenkins filed a timely claim for increased compensation, within the meaning of the proviso of § 43-3-4.

Appellees further contend that the board's reviewing power under § 43-3-4 is limited solely to the adjustment of the rate of compensation where there is a change in the physical condition of the claimant within three years of the original injury. Appellees argue, and we agree, that [fol. 93] the temporary total disability award here in question is not for a changed physical condition, but for a physical condition which has existed since the accident.

Appellees' contention that there must have been a change in the physical condition of the claimant since the prior award is supported by a decision of the same trial judge, in *Suryan v. Alaska Industrial Board*, 12 Alaska 571.

We agree that § 43-3-4 provides a method whereby the board may reconsider a previous decision, for the purpose of awarding increased compensation to cover adverse changes in physical condition subsequent to a prior award.³ We find nothing in § 43-3-4, or elsewhere in the act, however, which limits the power to reopen to cases involving changed physical condition. The words "and it shall afterwards develop" are broad enough to include not only changes in physical condition, but the disclosure of errors of law in connection with the award.⁴

The immediately-following words, "that he or she is or *was* entitled to a higher rate [emphasis added]," add substance to this construction. The word "was" indicates

³ We so held in *Hilty v. Fairbanks Exploration Co.*, (9 Cir.) 82 F. (2d) 77, and *Keehn v. Alaska Industrial Board*, (9 Cir.) 230 F. (2d) 712.

⁴ These words may also be broad enough to include the disclosure of errors of fact. However, in view of § 43-3-22, making a prior award conclusive and binding "as to all questions of fact," unless court proceedings are instituted within thirty days, it is uncertain (and we do not decide) whether the board may reopen a claim for the purpose of reconsidering questions of fact.

that the period during which a claimant may be entitled to increased compensation includes the time between the injury and the earlier award. This negatives the idea that increased compensation must relate to changed physical condition since the prior award.

It is true that, in § 43-3-1 and in the proviso at the end of § 43-3-4, the word "develop" is used to indicate progression of physical disability. But this is because the word is there used in juxtaposition with the words "injury" or "disability." These word combinations do not appear in the body of § 43-3-4, the language being "and it shall afterwards develop."

Appellees next argue that the board's decision of February 6, 1953, is conclusive and binding because no court [fol. 94] proceedings to contest the decision were instituted within thirty days, as provided by § 43-3-22.

Under § 43-3-22, the award is conclusive and binding "as to all questions of fact," unless tested in a court proceeding commenced within thirty days. The award for temporary total disability here in question involves no reconsideration of factual questions. It was known at the time of the prior award that Jenkins' physical condition had not been stabilized. The granting, on reconsideration, of his claim for temporary total disability was not based upon a redetermination of facts, but upon a different view of the meaning of the statute. We need not now decide whether, despite § 43-3-22, the board is authorized, under § 43-3-4, to redetermine questions of fact.

Appellees' final argument on the question of jurisdiction is that § 43-3-29, requiring claims to be filed within two years after the injury, barred the reopening of the claim. But, as before shown, the claim for increased compensation was filed on August 14, 1951, and amended on December 10, 1951, which dates are well within the two-year period. Hence, we need not decide whether the two-year period specified in § 43-3-29 governs in the case of reconsiderations, in view of the three-year limitation specified in the proviso to § 43-3-4.⁵

⁵ An additional jurisdictional question has suggested itself to us. Under § 43-3-4, the board is given authority to reopen claims for the purpose of increasing or decreasing the "rate of compensa-

We conclude that the board acted within its jurisdiction and power in reopening this claim for the purpose of further considering Jenkins' request for an award covering temporary total disability.

This brings us to the second principal question presented on this appeal. Where injuries, sufficient in themselves to constitute total and permanent disability, are the basis of the maximum award for such disability, may an allowance [fol. 95] nevertheless be thereafter made for temporary disability based on the failure to heal of an additional injury concurrently sustained?

The pertinent statutory provisions to be examined are the two paragraphs of Alaska Comp. Laws Ann., § 43-3-1 (1949), quoted in the margin.⁶

Appellants' contention that a workman may receive benefit payments for "temporary" disability after he has been awarded a lump-sum payment for total and "permanent"

tion." It may be that, in a strict sense, the granting of a temporary total disability award to one who has already received a permanent total disability award, is not an increasing of the "rate of compensation" of the original award. This question, however, was not discussed in the briefs or oral argument, and the answer is not so plain as to warrant us in dealing with it *sua sponte*.

⁶ The paragraphs of § 43-3-1 in question read:

"[*Temporary disability.*] For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

"Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event."

"[*Loss of members as total permanent disability.*] The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability."

disability resulting from injuries received in the same accident seems to involve a contradiction in terms. Appellants seek to avoid this apparent contradiction by segregating the injuries arising from a single accident. Thus, if, after finding some injuries sufficient to meet the statutory definition of "total and permanent disability," there are enough left over, when separately considered, to meet the statutory definition of "temporary disability," appellants believe the workman is entitled to both awards.

This reasoning might be permissible if we were concerned with permanent and temporary "injuries," as that word is used in the statute, rather than "disabilities," as that word is used in the statute. One may have a permanently injured arm and a temporarily injured leg. But if, by reason of certain injuries, a workman is, under the statute, totally and permanently disabled from doing any work, it follows [fol. 96] that there is, in legislative contemplation, no remaining ability to work which can be affected, either permanently or temporarily, by other injuries received in the same accident.

Appellants argue that the statutory schedule of payments for "total and permanent disability" represents mere arbitrary indemnities, not necessarily associated with loss of earning power. They contend that temporary disability compensation, on the other hand, is directly and solely related to loss of earning power, and thus is compensation for loss of wages during the healing period. Hence, appellants assert, there is no inconsistency in allowing payments for temporary disability after an award has been made for total and permanent disability.

The basic principle of all workmen's compensation laws is that benefits relate to loss of earning capacity and not to physical injury as such. In the case of the loss of certain members, total and permanent loss of earning power is conclusively presumed for the purpose of awarding compensation under the act.⁷ The individual receiving such an award may actually be able to continue some work, and hence be, in fact, not totally and permanently disabled. But the fact that some ability to work remains is not

⁷ See 2 Larson, *Workmen's Compensation* (1952 ed.) § 58.10.

to be taken into account in determining whether such an individual is entitled to the lump-sum award.

We think it must logically follow that this conclusive presumption cuts both ways. In fixing the compensation for certain injuries, defined in the act as constituting total and permanent disability, sustained in an accident, actual remaining ability to work is to be disregarded for all purposes—those which are favorable to the workman as well as those which are unfavorable. Under the presumption, whatever the facts may be, there is no remaining ability to work, and therefore no foundation for temporary disability benefits. There is likewise no foundation for an additional partial disability award which, under appellant's theory, would otherwise be available if it became necessary to amputate Jenkins' left foot. The award for total permanent disability resulting from loss of members [fol. 97] is thus intended as a maximum award for disability resulting from injuries received in an accident.

Appellants call attention to the second sentence of the quoted paragraph relating to temporary disability. It is there provided that, in all cases "where the injury develops or proves to be such" as to entitle the employee to compensation under some provision of the schedule "relating to cases other than temporary disability," the amount so paid or due him under the temporary disability schedule shall be in addition to the amount to which the employee shall be entitled under such other or permanent disability schedule. Cases of permanent injury are "cases other than temporary disability," within the meaning of this statute. *Libby, McNeill & Libby v. Alaska Industrial Board and Lathourakis* (9 Cir.) 191 F. 2d 262, Cert. Denied, 342 U. S. 913 (1952).⁸

As applied to the facts of this case, the sentence just noted does not authorize the payment of benefits for temporary disability after the workman has been found to have a permanent total disability. It means only that a

⁸ Lathourakis was allowed and paid \$2,005 for temporary disability suffered prior to his condition becoming fixed into permanent disability. He then received a lump-sum award of \$3,600 for fifty per cent permanent disability, and payments for temporary disability thereupon ceased.

lump-sum award for permanent total disability shall be in addition to any benefits theretofore paid or due for temporary disability. If an injury which causes "temporary" disability thereafter develops or proves to be a "total" disability, it is no longer a "temporary" disability.

The district court was therefore correct in holding that, after the disability was determined to be total and permanent, Jenkins was no longer entitled to monthly benefits for temporary disability.

In view of the ruling just stated, we feel constrained to discuss one more aspect of this case. The determination that Jenkins' disability was total and permanent was made by the board in July, 1951. The board, however, attempted to relate back this determination of his status to October 28, 1950, when the second member was amputated. The [fol. 98] board took this action under the mistaken view that any payment for temporary disability was improper. The result was that there was deducted from Jenkins' \$8,100 award for permanent total disability the thirty-eight weekly payments he had received as temporary disability payments since the October date. As before indicated, the total sum so deducted was \$3,645, leaving Jenkins but \$4,455 of his lump-sum award. This action was confirmed by the board's decision of February 6, 1953, except that an award of \$476.70 was made for temporary disability benefits due prior to October 28, 1950.

In our view, the temporary disability payments should not have been deducted from the lump sum to which Jenkins became entitled by virtue of being permanently and totally disabled. We say this notwithstanding the established fact that the loss of members warranting a classification of total and permanent disability unquestionably occurred on October 28, 1950.

Our opinion on this point is governed by the paragraph of § 43-3-1 which relates to temporary disability. It is there provided that when the injury develops or proves to be such as to entitle the employee to compensation under some other provision of the schedule (in this case, the provision relating to total and permanent disability), the

⁹ Keehn v. Alaska Industrial Board, note 3, *supra*.

amount so paid or due him under the temporary disability schedule shall be in addition to the amount to which he shall be entitled under such other or permanent disability schedule.

We have heretofore interpreted the words "and it shall afterwards develop", as used in § 43-3-4, to include not only changes in physical condition, but also the disclosure of errors of law in interpreting the statute. Section 43-3-1, now under consideration, uses these same quoted words plus the words "or proves." The added words do not, in our view, affect the meaning to be attributed to this provision. We therefore construe this provision of § 43-3-1 in the same way the similar provision in § 43-3-4 has been construed.

Until July 25, 1951, when the employer and the insurance company reclassified appellant as totally and permanently disabled, he was entitled to receive the temporary benefits which were being paid to him, because he was then classified as temporarily disabled. It follows that, under the para-[fol. 99] graph of § 43-3-1 to which reference has been made, the lump-sum payment awarded on July 25, 1951, should not have been reduced by the sum Jenkins had received, or there was then due him, as a temporary disability award.¹⁰

There is good reason for this statutory requirement. Benefits for temporary disability are determined as a percentage of average daily wages, and are paid at the time compensation is customarily paid for labor performed at the employer's plant. See § 43-3-1. Such benefits, therefore, are considered as income, and are normally treated

¹⁰ *Libby, McNeill & Libby v. Alaska Industrial Board and Lathourakis*, *supra*. It was there pointed out that the prior 1929 act did require the amount paid for temporary disability to be deducted from the award under other provisions of the act. This was changed when the present language was enacted in 1946.

The provisions of § 43-3-4 providing for the deduction of amounts already paid, and providing that a new award may be made effective from date of injury, relate to cases wherein a "higher rate of compensation" is awarded. When the employer and the insurance company decided to reclassify appellant as totally and permanently disabled, they were not awarding him a higher rate of compensation.

and expended as such by workmen covered by the act. Lump-sum payments for permanent total disability, on the other hand, are intended to represent capitalization of future earnings.

Hence, if a workman should rely upon the classification of a disability as temporary and treat payments so received as income, the deduction of those payments from his award for permanent disability would leave the injured workman with a sum much less than what the legislature intended as a capitalization of his future earnings.

We accordingly hold that the lump-sum payment of \$8,100 should be in addition to the \$3,645 paid for temporary disability on and after October 28, 1950, and in addition to the \$476.70 award overdue for temporary disability prior to October 28, 1950.

This deduction question was not presented in the trial court, and was not argued in the briefs. It was dealt with to some extent during oral argument. Normally, we would not consider and determine a question not presented in the [fol. 100] trial court and in briefs. This case, however, has been pending for more than five years, thus rendering a remand undesirable. The point under discussion is a matter of public interest in connection with the administration of an important act having wide application. We have therefore considered it appropriate to depart from our usual practice, noted above, so that the case can finally be disposed of on the basis of this opinion.

The judgment is modified in accordance with the views expressed in this opinion, and in all other respects is affirmed.

CHIEF JUDGE DENMAN, dissenting:

I dissent from the majority opinion's harsh and unjust conclusion resulting from its failure to apply to the relationship between the statutory provision for total permanent and total temporary disability, the same liberal rule of interpretation of the Supreme Court and this court,¹ that the majority opinion does in considering the statute's time limitations.

¹ *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 414 (1932); *Libby, McNeill & Libby v. Alaska Industrial Board*, 191 F. 2d 262, 264 (Cir. 9, 1951).

It is obvious and admitted by the majority opinion that an employee's loss of two limbs, here a hand and a foot, does not create his total disability to work. There are many employments for a person with one good hand who can walk with an artificial leg or for one who has two good hands and a wheel chair.

Hence the statement of the statute that such loss "shall constitute total and permanent disability and be compensated according to the provisions of this act with reference to total and permanent disability" can well be construed liberally as providing no more than that one having such an injury shall receive a certain amount of money in any event. Since such a liberal construction would leave to the injured man after the amputation the right to claim compensation for the actual continuing temporary disability from the infections in his left foot, we are required to make it.

[fol. 101] The statute provides for payment from the employer for "all injuries causing temporary disability".²

If this provision covers all temporary disabilities from a single industrial accident, the narrow and strict construction of the majority which reads "all" to mean all injuries except those accompanied by a loss of two limbs, etc., distorts the statutory language by depriving the word "all" of its plain meaning in violation of long established principles of statutory construction.³

² The pertinent portion of Section 43-3-1 reads as follows:

"*Temporary disability.* For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule." [Emphasis added.]

³ *Rice v. Minn. & N.W.R.R.*, 66 U.S. 358, 379 (1861) ("... it is not competent for this court to reject or disregard a material part of an act of Congress, unless it be so clearly repugnant to the residue of the act that the whole cannot stand together."); *United States v. Raynor*, 302 U.S. 540, 547 (1938) ("A construction that creates an inconsistency should be avoided when a reasonable inter-

The court's narrow construction leads to a most anomalous result. Under the opinion's rationale, a man like Jenkins who loses two limbs in or shortly after an accident is entitled to total permanent compensation immediately [fol. 102] (\$8,100),⁴ but receives nothing thereafter during a long period of hospitalization which may last for several years. On the other hand, a worker who has both legs crushed in an accident (his injury being less serious initially), and is hospitalized for several years while physicians fight to save his legs, gets temporary disability as long as he is in the hospital until a medical end result is reached. This may amount to many thousands of dollars (65% of his weekly pay). If at the end of that time amputation is found necessary, he then receives the total permanent disability lump sum payment in addition. Thus although the end result in each case is the same, the man whose injury was apparently less severe initially gets more compensation. And if the man whose legs were merely crushed did not have to have them eventually amputated, he still could receive more compensation than one in Jenkins' position if his period of temporary disability was long enough.⁵

pretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress."); 2 Sutherland, Statutory Construction § 4705.

⁴ The provision of the Alaska statute for a lump sum award for total permanent disability which is fixed in amount regardless of the injured man's previous wage rate is unique. All other workmen's compensation statutes in this country provide for periodic payments which in all jurisdictions except three vary in amount according to the workman's pay rate prior to his injury. See 2 Larson, Workmen's Compensation Law, App. B, Table 8, pp. 524-6 (1952), consisting of a comparison of the total permanent disability provisions of the workmen's compensation laws of 53 jurisdictions. Liberal interpretation of this unique statute requires that we not construe it to deprive the injured man of the temporary compensation which is based on his wage loss and limit him to a mere fixed sum unrelated to his loss of wages in the absence of a clear statutory mandate to that effect.

⁵ At the rate of total temporary compensation to which Jenkins was entitled (\$95.34 per week) the temporary compensation would

Nothing in the statute compels this result. In fact the second sentence of the provision of Section 43-3-1 defining temporary disability suggests that permanent and temporary disability payments may both be payable at the same time for one injury, and nothing therein restricts this result to cases where the workman becomes entitled first to temporary disability and thereafter to permanent disability.⁶ In my view the argument of the opinion based on the distinction between "injuries" and "disabilities" ignores the realities of the situation and relies on semantics. Such semantical refinements are not sufficient to support the harsh and unreasonable construction of the statute which leads to the conclusion that one who is less severely injured (and suffers less disability) may receive more compensation than one who is more seriously disabled. The words of the Supreme Court in *Baltimore & Phila. [fol. 103] Steamboat Co. v. Norton*, 284 U.S. 408, 413 (1932), appear pertinent:

"It may not reasonably be assumed that Congress intended to require payment of more compensation for a lesser disability than for a greater one including the lesser. Nothing less than compelling language would justify such a construction of the Act."

The temporary disability provisions of the Alaska statute are typical of those of most other jurisdictions in this country. In the absence of a clear statutory mandate to the contrary, the Alaska statute should be construed, as have those of other jurisdictions, as providing temporary

exceed the total permanent lump sum payment (\$8,100) after only 20 months of total temporary disability. According to the determination of the Board, Jenkins' total temporary disability continued more than three years after his injury.

⁶ That sentence reads: "And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule."

disability compensation during the healing period until a medical end result is reached.⁷

There is nothing contrary to this in this court's opinion in *Keehn v. Alaska Industrial Board*, 230 F.2d 712 (Cir. 9, 1956). There the physicians had determined that a medical end result had been reached, a 40% permanent disability award had been made and "A" compromise and release signed by the parties." 230 F.2d at 713. Here no such result had been reached and no compromise settlement made, and we are concerned with the initial healing period prior to the occurrence of a medical end result.

It appears to me that the statement of the majority opinion that, "in the case of the loss of certain members, total and permanent loss of earning power is conclusively presumed for the purpose of awarding compensation under the act"⁸ which, the opinion asserts, is supported by *Larson*, has no such support as applied to the issue presented in this case. This conclusive presumption is applied, as *Larson's* text shows, to prevent the deduction of any wages actually earned by a worker who is totally and permanently disabled within the meaning of a workmen's [fol. 104] compensation statute from his total permanent disability award.⁹ Nothing in the text supports the ma-

⁷ See, e.g., *McCall v. Potlatch Forests*, 208 P.2d 799, 801 (Ida. 1949); *Shell Oil Co. v. Industrial Commission*, 119 N.E.2d 224, 230 (Ill. 1954); *Gorman v. Atlantic Gulf & Pacific Co.*, 12 A.2d 525 (Md. 1940); *Laurel Daily Leader v. James*, 80 So.2d 770, 773 (Miss. 1955); *Fallis v. Vogel*, 290 N.W. 461 (Neb. 1940); *Petersen v. Foundation Co.*, 25 A.2d 1 (N.J. 1942); *Peerless Sales Co. v. Industrial Commission*, 154 P.2d 644 (Utah 1944); *Johnson v. Cox*, 82 So.2d 562 (Ala. App. 1955).

⁸ Majority opinion, p. 9.

⁹ 2 *Larson*, *Workmen's Compensation Law*, § 58.10, p. 42 (1952). See, e.g., *Great American Indemnity Co. v. Segal*, 229 F.2d 845 (Cir. 5, 1956), where the court, in affirming a total disability award and disallowing a deduction for wages earned by the disabled worker, quoted a Texas decision as follows:

"[T]otal incapacity does not mean utter inability to do any work at all, but that a man's disability is total, within [the meaning of the statute], when he can no longer 'secure and hold employment for physical labor' such as he had to do to make a living prior to his injury."

229 F.2d at 846.

majority's statement that "this conclusive presumption cuts both ways" and therefore that it must be applied to reduce the injured workman's compensation.¹⁰ So applied, the presumption defeats the purpose which it was created to serve (i.e., to maximize the recovery of the injured man), and as applied to the present facts, results in a construction of the statute which violates the principle of the *Norton* case, *supra*.

It is significant that under other workmen's compensation statutes which closely resemble the Alaska statute in their provisions for the determination of permanent and temporary disability, a large number of cases have held that where "the effects of the loss of a member extend to other parts of the body . . . the schedule allowance for the lost member is not exclusive."¹¹ These cases are but another illustration of the liberal rule of construction in workmen's compensation cases.¹² Since temporary disability compensation covers the healing period,¹³ it appears to me that a fortiori the same rule of construction requires us to hold that where the failure of an amputation to heal [fol. 105] has inflicted upon the workman a temporary disability in fact far greater than the loss of the limb itself he is entitled to total temporary disability compensation until the healing of the amputation is completed.

Instead of the liberal treatment to which this unfortunate man and his family are entitled the majority is leaving him unpaid for the long period of *actual* total disability admittedly arising from the electric burning in his employer's service, and a most harmful rule of construction is established for this circuit.

¹⁰ Majority opinion, p. 9.

¹¹ *Larson*, op. cit. *supra* note 9, § 58.20 p. 44, cases cited note 38.

¹² *Larson*, op. cit. *supra* note 11, p. 45. The text writer suggests that "destruction of the most favorable remedy should not be read into the act by implication." *Ibid*. In contrast to other workmen's compensation statutes, the provision of the Alaska Act for temporary disability compensation is more adequate than its permanent disability compensation provisions (note 4 *supra*). Hence the above quoted principle here strongly supports affirmance of the Board's decision.

¹³ Note 7, *supra*.

POPE, Circuit Judge, dissenting:

What Judge Denman has pointed out in his footnote, 4, namely, that the lump sum payment under the Alaska statute is in no way related to the wage scale of the injured workman, has convinced me that it is not proper to apply here what the majority opinion calls a "basic principle of all workmen's compensation", that is, that "benefits relate to loss of earning capacity and not to physical injury as such." My difficulty is in seeing how we can read a "basic principle" into a statute like this one which bears evidence of having been drawn on a very different theory.

The majority opinion says: "One may have a permanently injured arm and a temporarily injured leg." Just as self-evident is the proposition that one may have a permanently injured arm and leg and a temporarily injured leg, or he may lose an arm and a leg and have a temporarily injured leg. That is this case.

The opinion further says: "The individual receiving such an award [i.e., for loss of an arm and a leg] may actually be able to continue to do some work." I have not been able to find in the statute anything which says that if that ability to continue to do some work is temporarily impaired by injury of the remaining leg, he shall receive no compensation for that distinct temporary disability.

The majority opinion appears to get away from that by asserting the existence of a conclusive presumption that "cuts both ways". According to the opinion it "cuts both ways" so that although the person receiving the lump sum award may "actually be able to continue some work" yet he [fol. 106] is conclusively presumed not to be able to do what he is "actually" able to do. The opinion arrives at this conclusive presumption that "cuts both ways" by extending the presumption discussed by Larson (see footnote 7) in a manner for which the cases cited by Larson furnish no authority. Those cases indulge the conclusive presumption for the *protection* of the workman and to prevent him from losing his total permanent disability award. I think the Alaska statute does not warrant ere-

ating a presumption that cuts the other way and minimizes the compensation which the workman might otherwise claim.

It is a universally accepted rule relating to workmen's compensation laws that they should be liberally construed in favor of the injured workman. When I know it is a fact, as the majority opinion concedes, that a workman who has lost an arm and a leg may actually be able to continue some work and that such work may for the time being be prevented by what the opinion calls a "temporarily injured leg", I cannot be persuaded that I should create a new double-edged presumption that what I thus know to be possible is as a matter of law impossible.

I am persuaded that if we would not import into this unique statute any "basic principle" or "conclusive presumption" not actually found in the act itself, and would just take this statute by its four corners and apply the usual liberal construction in favor of the injured workman, we would have to find that it provides that the fixed award for certain specified injuries was not intended to bar further compensation for the temporary loss of such earning power as remained after the injury.

With Judge Denman I think the judgment should be reversed.

[File endorsement omitted]

[fol. 107] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14616

ALASKA INDUSTRIAL BOARD, and
CARL E. JENKINS, Appellants,

v.

CHUGACH ELECTRIC ASSOCIATION, INC., a corporation and
GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., a corporation, Appellees.

JUDGMENT—Filed and Entered April 29, 1957

Appeal from the District Court for the District of
Alaska, First Division.

This cause came on to be heard on the Transcript of the Record from the District Court for the District of Alaska, First Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court be, and hereby is modified in accordance with the views expressed in the opinion of this court, and in all other respects the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the Appellants and against the Appellees.

It Is Further Ordered and adjudged by this Court that the Appellants recover against the Appellees for their costs herein expended and have execution therefor.

[File endorsement omitted]

[fol. 108] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 109] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: Denman, Chief Judge, and Stephens, Healy, Pope, Lommon, Fee, Chambers, Barnes, and Hamley, Circuit Judges.

MINUTE ENTRY OF ORDER DENYING PETITION
FOR REHEARING—June 7, 1957

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellees, filed May 28, 1957, and within time allowed therefor by rule of court for a rehearing of the above cause be, and hereby is denied.

[fol. 110] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 111] IN SUPREME COURT OF THE UNITED STATES

No. 303, October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—October 14, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.